No. 89-5691-CFY
Status: GRANTED

Title: Frasiel L. Hughey, Petitioner
v.
United States

Docketed:
September 25, 1989

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Campbell,Lucien B.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 25 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 24 1989		Order extending time to file response to petition unti November 27, 1989.
5	Nov 27 1989		Brief of respondent United States in opposition filed.
6	Nov 30 1989		DISTRIBUTED. January 5, 1990
8	Jan 8 1990		Petition GRANTED. and the parties are directed to adhe to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondent must be received by the Clerk on or before March 6, 1990, and reply brief, if any, must be received by the Clerk on before March 16, 1990.
			**********
9	Jan 26 1990		SET FOR ARGUMENT TUESDAY, MARCH 27, 1990. (2ND CASE)
10	Feb 5 1990		Joint appendix filed.
11	Feb 6 1990		Brief of petitioner Frasiel L. Hughey filed.
12	Feb 7 1990	G	Motion of the Solicitor General to permit Amy L. Wax, Esq. to present oral argument pro hac vice filed.
13	Feb 20 1990		Motion of the Solicitor General to permit Amy L. Wax, Esq. to present oral argument pro hac vice GRANTED.
14	Feb 26 1990		Record filed.
		*	3 vol.-transcript from USCA 5.
15	Mar 2 1990		CIRCULATED.
16	Mar 6 1990	X	Brief of respondent United States filed.
17	Mar 6 1990	G	Motion of Insurance Crime Prevention Institute, et al. for leave to file a brief as amici curiae filed.
18	Mar 6 1990	X	Brief amicus curiae of City of New York filed.
20	Mar 16 1990	X	Reply brief of petitioner Frasiel L. Hughey filed.
19	Mar 19 1990		Motion of Insurance Crime Prevention Institute, et al. for leave to file a brief as amici curiae GRANTED.
21	Mar 27 1990		ARGUED.

(2)

NO. 89-5691

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ORIGINAL

FRASIEL L. HUGHEY,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

NOW COMES Petitioner Frasiel L. Hughey, by and through his undersigned attorney, and pursuant to Rule 46.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed in forma pauperis, and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended in the district court and the court of appeals.

DATED: September 25, 1989

Respectfully submitted,

LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-207
San Antonio, Texas 78206-1203
(512) 229-6700

ATTORNEY FOR PETITIONER

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ORIGINAL

FRASIEL L. HUGHEY,

PETITIONER,

V. 89-5691

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Frasiel L. Hughey, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered July 27, 1989.

QUESTION PRESENTED FOR REVIEW

Whether the Victim and Witness Protection Act permits an order of restitution in excess of the loss caused by the offense of conviction, especially where that offense does not incorporate a scheme to defraud, and where the Defendant does not agree as part of a plea agreement, or during the guilty plea colloquy, or the sentencing hearing, to make restitution in such excess amount.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court.

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OPINION BELOW

The opinion in the court of appeals is published as United States v. Hughey, 877 F.2d 1256 (5th Cir. 1989). A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Jurisdiction of this Court to review the judgment in question by writ of certiorari is conferred by Title 28, United States Code, Section 1254(1).

DATE OF JUDGMENT

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, announced on July 27, 1989. This petition is filed within sixty days after said judgment was entered. Rule 20.1, Supreme Court Rules.

STATUTORY PROVISION INVOLVED

Title 18, United States Code, § 3663(a)(1) (formerly 18 U.S.C. § 3579(a)(1)) provides:

> The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.[1]

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

Petitioner Frasiel L. Hughey (hereinafter Petitioner) was charged by indictment in the Western District of Texas with three counts of mail theft (18 U.S.C. § 1709) and three counts of fraudulent use of a credit card (18 U.S.C. § 1029(a)(2)). Pursuant to a plea agreement which was silent as to restitution, Petitioner entered a plea of guilty to one count of the indictment. That count alleged fraudulent use of a credit card issued by MBank to one Hershey Godfrey, in an amount in excess of $1000. During the guilty plea proceeding, the court advised the Petitioner in general terms only that "you may be required to make restitution in the form of money for any property loss suffered by the victim as a result of this offense." At a later stage of the plea, the government advanced as part of the factual basis that the Petitioner had stolen the Godfrey credit card "as well as a number of other cards . . . ." Petitioner promptly advised the court that he was not acknowledging or responding to any allegations other than the Godfrey count to which he was pleading guilty.

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[1]The statutory provision involved was renumbered from § 3579 to § 3663 by the Sentencing Reform Act of 1984, P.L. 98-473, § 212(a)(1), 98 Stat. 1987 (Oct. 12, 1984). For consistency with the record, briefs, and court of appeals opinion, this petition will use the former number.

After the plea of guilty but prior to sentencing, Petitioner was notified by the Probation Office that he might be required to make restitution in the amount of $147,646.89. Pursuant to local procedure, Petitioner objected to the proposed restitutionary figure, and offered to make restitution in a compromise amount of $10,422--that sum representing the total loss attributed to fraudulent use of the Godfrey credit card described in the count of conviction. The government insisted upon restitution in the amount of $90,431, based upon losses flowing from unauthorized use of 21 credit cards issued by MBank to Godfrey and 18 others.

At a sentencing hearing, the government offered a stipulation tending to show Petitioner's responsibility for those $90,431 of losses, including losses incurred on cards other than Godfrey's. The stipulation itself recited that it was a stipulation as to expected testimony and not a stipulation of fact. Petitioner did not object to introduction of the stipulation, but he reemphasized in open court that the stipulation was as to testimony and not facts, and that he was not making any admission of any fact contained therein. Petitioner objected to any restitutionary order in excess of the $10,412 losses on the Godfrey credit card, on the ground that such an order would exceed the court's authority under the Victim and Witness Protection Act as well as his ability to pay. The court sentenced Petitioner to eight years imprisonment, and ordered him to make restitution in the amount of $90,412.

Petitioner timely filed a "Motion to Reduce Sentence and to Correct an Illegal Sentence" under authority of Rule 35, F.R.-Crim.P., raising the illegality of the restitution order. The court's denial of that motion was affirmed on appeal by the court of appeals.

REASONS FOR GRANTING THE WRIT

I. Merits of the Issue

The Statute

The restitution provision in question was first enacted as part of the Victim and Witness Protection Act of 1982 (VWPA).[2] It was intended to expand the existing restitution provision, which authorized an order of restitution only as a condition of probation:

> While on probation and among the conditions thereof, the defendant--
>
> . . .
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had.[3]

In keeping with the express language of the statute, the courts had generally held that restitution was limited to losses flowing from the offense of conviction.[4]

The principal legislative history of the Victim and Witness Protection Act is the Senate Report.[5] Discussing Title III--Restitution, the Senate Report identified problems of then-current law:

1) Under then-current law, the court may order restitution only as a condition of probation;

2) Even that discretionary restitution authority was "infrequently used and indifferently enforced";

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[2]P.L. 97-291, § 5(a), 96 Stat. 1253 (Oct. 12, 1982).

[3]Title 18 U.S.C. § 3651; repealed, P.L. 98-473, Title II, c. II, § 212(a)(2), 98 Stat. 1987 (Oct. 12, 1984), as amended by P.L. 99-217, § 4.99 Stat. 1728 (Dec. 26, 1985), effective November 1, 1987.

[4]See, e.g., United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983); United States v. Black, 767 F.2d 1334, 1343 (9th Cir.), cert. denied, 474 U.S. 1022 (1985); but see United States v. McMichael, 699 F.2d 193, 195 (4th Cir. 1983).

[5]S.Rep. No. 532, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 2515-51.

3) Federal statutes, unlike many state statutes, did not "declare that the underlying facts of an adjudicated crime are to be treated as res judicata in a later civil proceeding";

4) Restitution was less likely to be ordered if the victim was insured, thus requiring the insurance-buying public to pay off the offender's debt; and

5) Enforcement of restitution orders was lax.[6]

Neither in the "Problems of Current Law" section, nor elsewhere in the report is limitation to the offense of conviction identified as a problem. Instead, the section-by-section analysis states:

> Section 3579(a) expands current law by authorizing an order of restitution independent of a condition of probation, thereby permitting its use in conjunction with imprisonment, fine, suspended sentence, or other sentence imposed by the court.[7]

As originally enacted, the statute provided:

> The court, when sentencing a defendant convicted of an offense . . . may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

18 U.S.C. § 3579(a)(1). A 1986 amendment of this subsection changed the last words from "any victim of the offense" to "any victim of such offense".[8]

Case Authority Interpreting the Statute

Case authority interpreting the reach of the restitution power under the VWPA may be divided into four groups. The Sixth and Eleventh Circuits have said that such restitution is limited to the offense of conviction. The Ninth Circuit permits restitution orders beyond the offense of conviction, where the losses were produced by a scheme to defraud which was an element of the offense

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[6]Senate Report at 30-31.

[7]Senate Report at 32 (emphasis added).

[8]P.L. 99-646, § 79, 100 Stat. 3618 (Nov. 10, 1986)(emphasis added). The catchline for Section 79 of this act, the "Criminal Law and Procedure Technical Amendments Act of 1986", identifies it as a "CLARIFYING AMENDMENT". That clarifying amendment took effect after the offense conduct in this case, but prior to imposition of sentence including order of restitution.

of conviction. The Seventh Circuit additionally requires the defendant's agreement to such restitution. The Second, Fifth, and Tenth Circuits permit restitution orders beyond the offense of conviction where there is a "significant connection" with the offense of conviction.

The Restrictive Approach

In United States v. Durham, 755 F.2d 511 (6th Cir. 1985), the defendant was convicted of bank robbery. He challenged the legality of a restitution order requiring him to pay the insurer of an automobile destroyed during the course of his getaway. While reading the term "any victim" broadly to reach the getaway car insurer, the court read the term "offense" restrictively:

> Nowhere in the Act is the term "victim" or "offense" defined. Nevertheless, we are not without guidance in attempting to discover Congress' meaning. Initially, section 3579(a)(1) provides for restitution to a victim of the "offense." A natural construction of this language would require that the defendant make restitution only to victims of the offense for which he is convicted. Nothing in the statute or the legislative history requires a contrary reading.

To the same effect is United States v. Mounts, 793 F.2d 125, 127 (6th Cir. 1986) (noting the court had adopted in Durham, a narrow definition of "offense" limiting restitution to victims of the offense of conviction). A similar treatment of the issue is seen in United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986), wherein the court stated that, under either 18 U.S.C. § 3579 (the VWPA) or § 3651 (the Federal Probation Act), the amount of restitution "may not exceed the actual losses flowing from the offense for which the defendant has been convicted." 800 F.2d at 1571 (emphasis added).

The "Scheme to Defraud" Approach

In United States v. Pomazi, 851 F.2d 244 (9th Cir. 1988), a defendant convicted of mail fraud objected to a restitution order which reached beyond the counts of conviction. The court of appeals noted that mail fraud includes as an element of the offense

a scheme to defraud, and the defendant therefore stood convicted of the scheme as a whole. The court went on to hold that "when the crime charged involves a scheme to defraud, a sentencing court may order restitution paid to victims of the entire scheme even though all of them are not named in the indictment . . . ." Id. at 250. This approach was recently reaffirmed by the Ninth Circuit, while reemphasizing certain conditions and protections. United States v. Barany, No. 88-1090, ___ F.2d ___, 1989 WL 101636 (9th Cir., Sept. 7, 1989).

In the Seventh Circuit, restitution beyond the conviction counts, where a scheme to defraud was afoot but was not an element of the offense, may be ordered only with the consent of the defendant. United States v. Paul, 783 F.2d 84, 88-89 (7th Cir. 1986). The Seventh Circuit recently reaffirmed this principle:

> That is not to say that an order of restitution cannot exceed the losses originally alleged in the count or counts of the indictment to which the defendant pleads guilty. In Paul, we reaffirmed that an order of restitution in excess of the losses alleged in the indictment is proper as long as the unlawful proceeds were obtained as part of an ongoing scheme to defraud, and the defendant consented to the damages figure in the plea agreement and at the subsequent hearing on the plea before the district court.

United States v. Peredo, No. 88-2875, ___ F.2d ___, 1989 WL 106699 (7th Cir., Sept. 19, 1989)(emphasis added).

The "Significant Connection" Approach

In United States v. Berrios, 869 F.2d 25 (2d Cir. 1989), the defendant pleaded guilty to mail theft of a $1,349 check. At the plea colloquy, the government represented that total losses for the overall offense conduct were nine checks totalling $2,905, and the court specifically warned the defendant that restitution of $2,905 might be ordered. At sentencing, the defendant alluded to a moral obligation to repay the entire amount and an intention to do so, objecting only to the legal basis for an order in excess of the amount in the count of conviction. Apparently swayed by this creditable representation, the court granted probation with

restitution of $2,905. The defendant then attacked the restitution order.

It was against this backdrop that the Second Circuit labored to read the VWPA in such a way as to uphold the restitution order. It engaged in a statutory interpretation exercise (adopted by the Fifth Circuit in the case at bar) to overcome the clear import of § 3579(a)(1) that the court may order one convicted of an offense to make restitution to any victim "of such offense". A separate concurring opinion in Berrios would affirm only on a waiver theory, since the defendant agreed he caused all the losses, represented that he would abide by the court's order, and sought a favorable sentence by implying an obligation and intention to pay. The concurring opinion cautioned:

> In my view, ordering restitution in an amount higher than the amount charged in the information is only proper where the higher amount is attributable to collateral consequences arising out of the specific offense to which the defendant has plead guilty. Where there are no such consequences, ordering restitution in the higher amount is an improper expansion of the court's sentencing power.

869 F.2d at 33 (Meskill, Circuit Judge, concurring)(emphasis added).

In United States v. Duncan, 870 F.2d 1532 (10th Cir. 1989), petition for certiorari filed, No. 88-7294, May 15, 1989, the Tenth Circuit went to the "significant connection" formulation. While the conviction was for mail fraud, thus including a scheme to defraud, the restitution order included losses to the same victim on dismissed counts which were not part of the scheme. The Tenth Circuit went substantially beyond its earlier case of United States v. Hill, 798 F.2d 402 (10th Cir. 1986), which authorized restitution beyond the count of conviction on a record which had a strong suggestion of waiver.

The Case at Bar

In the instant case, the restitution order beyond the offense of conviction was not authorized by the governing statute,

nor allowed by any of the exceptions recognized by other courts of appeals. In adopting the "significant connection" approach, and in applying it to this case, the court of appeals erred. To summarize:

1) The transaction of which Petitioner stood convicted was one fraudulent use of a credit card in the amount of $1055.

2) During the guilty plea, the court warned the Petitioner only that he might be required to make restitution for loss suffered "as a result of this offense". Petitioner expressly stated that he was not admitting to any offense outside the count to which he was pleading guilty.

3) The offense of conviction did not include as an element a scheme to defraud.

4) The Petitioner did not consent to a restitution order in the amount entered. Petitioner did suggest a compromise figure of $10,412, representing all losses incurred by the victim named in the count of conviction, on the credit card described in the count of conviction. The court, however, went far beyond that suggestion to order restitution of $90,431.

5) Petitioner did not represent or imply that he would pay a greater amount in order to obtain a lenient sentence, and then challenge the order. He consistently opposed a larger order, both on inability to pay,[9] and lack of statutory authority.

Notwithstanding these important differences, the Fifth Circuit has gone beyond the offense of conviction, beyond the scheme-to-defraud element, beyond consent, and beyond waiver doctrine to extend the restitution authority beyond its statutory compass. It must be remembered that restitution is a criminal penalty. It is so characterized in the statute--"in addition to or in lieu of any other penalty authorized by law . . . ."[10] This Court has recognized the penal nature of a restitution order.[11] As

[9]See 18 U.S.C. § 3580(a).

[10]Title 18 U.S.C. § 3579(a)(1).

[11]Kelly v. Robinson, 107 S.Ct. 353, 360 n. 10 (1986).

such, statutory provisions authorizing restitution orders must be strictly construed. There can be no free-form penalties in a criminal case; lacking specific statutory authorization, the restitution order sanctioned by the Fifth Circuit is illegal.

II. Importance of the Issue

The restitution provisions cover all Title 18 offenses and certain violations of the Federal Aviation Act. 18 U.S.C. § 3579(a)(1). "If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor." 18 U.S.C. § 3579(a)(2). The proper administration of the VWPA is of considerable importance to the administration of the federal criminal justice system. The restitution provisions at issue in this case serve at once the deterrent, punitive, and rehabilitative goals of the system.

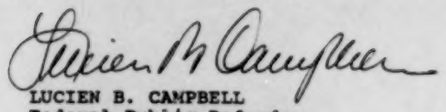
The widely varying interpretations of § 3579(a)(1) have left a patchwork enforcement system. Depending upon the circuit, restitution beyond the count of conviction either 1) may not be available; 2) may be available if the conviction included a scheme to defraud; 3) may be available upon conviction of a scheme to defraud if the defendant consents; 4) may be available if the defendant makes representations amounting to waiver; or 5) any time a "significant connection" is seen between the conviction count and other losses. This degree of inter-circuit conflict is intolerable.

CONCLUSION

This Court should grant certiorari to resolve the multilateral circuit conflict on the scope of the restitution authority.

WHEREFORE, premises considered, Petitioner prays this Honorable Court will grant his petition for writ of certiorari.

Respectfully submitted,



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APPENDIX C—Continued

tory amendment itself, were unnecessary to the decision of this appeal and have been criticized by both parties in their requests for reconsideration of the decision. Both parties have noted the possibility that these portions of the decision can be construed as being inconsistent with the Board's holding in this case. Upon reconsideration we recognize this discussion unnecessarily detracted from the holding by the Board. Accordingly, we hereby strike footnote 3 and the first paragraph on page 128 of the decision. The remainder of the Board's decision in *Amoco Production Co., supra*, is affirmed, as clarified by this decision. The Board specifically reaffirms the prior holding that the value of production for all of the gas from lease OCS–G–1972 during the 1977 through 1981 period involved was the price set in the Columbia Gas contract and approved by the August 1972 and March 1973 Survey letters, since no higher price was received.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in *Amoco Production Co.*, 85 IBLA 121 (1985), is affirmed as modified by this decision.

R.W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN THE RESULT:

Our holding holds and our dicta do not: that is all the parties ask us to clarify and all we need to say.

Will A. Irwin
Administrative Judge

UNITED STATES of America, Plaintiff–Appellee,

v.

Frasiel L. HUGHEY, Defendant–Appellant.

No. 87–5596.

United States Court of Appeals, Fifth Circuit.

July 27, 1989.

After defendant pleaded guilty to one count of illegal credit card use out of six-count indictment and was required to make full restitution under the Victim and Witness Protection Act, defendant moved to correct sentence on ground that he could not be ordered to pay restitution beyond that attributable to one criminal act of which he pleaded guilty. The United States District Court for the Western District of Texas, H.F. Garcia, J., denied motion, and defendant appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) defendant's guilty plea to one offense of misuse of credit card, in conjunction with Government's offer of proof, formed sufficient basis for order of complete restitution; (2) probative standard of proof was preponderance of evidence; and (3) record was sufficient upon which to base order of restitution.

Affirmed.

1. Criminal Law ⇐1139

Legality of criminal sentence is examined on de novo basis.

2. Criminal Law ⇐1208.4(2)

Defendant who was charged with multiple offenses but who pleaded guilty to only offense could nonetheless be required to make restitution under the Victim and Witness Protection Act for acts of which he was not specifically found guilty resulting in losses to victim beyond those attributable to offense of conviction. 18 U.S.C.(1982 Ed.) §§ 3579, 3580.

3. Criminal Law ⇐1208.4(2)

In order for penalty of restitution to be imposed pursuant to the Victim and Witness Protection Act, preponderance of evidence standard of proof that victim sustained losses is appropriate rather than criminal standard of "beyond reasonable doubt"; purpose of Act is restitutive, and restitution is assessed as part of sentencing but is not tantamount to finding of criminal responsibility. 18 U.S.C.(1982 Ed.) § 3580(d).

4. Criminal Law ⇐1208.4(2)

Defendant who was ordered to pay restitution under the Victim and Witness Protection Act for offenses which were not basis of conviction was provided with adequate procedural safeguards prior to imposition of order of restitution; defendant was notified in advance that restitution in amount greater than that related to offense for which defendant pleaded guilty would be sought, attorney briefed issues in presentence hearings, government came forward with proper testimony to demonstrate amount of financial loss for which defendant was responsible and defendant did not dispute accuracy of calculation of amounts proposed. 18 U.S.C.(1982 Ed.) §§ 3579, 3580, 3580(d); Fed.Rules Cr.Proc. Rule 32, 18 U.S.C.A.

5. Criminal Law ⇐1208.4(2)

In order for restitution to be imposed pursuant to the Victim and Witness Protection Act, Government bears burden of proving amount of loss sustained by victim, but burden of demonstrating defendant's lack of financial resources is upon defendant. 18 U.S.C.(1982 Ed.) § 3580(d).

6. Criminal Law ⇐1208.4(2)

Indigency does not bar restitutive award under the Victim and Witness Protection Act. 18 U.S.C.(1982 Ed.) §§ 3579, 3580.

7. Criminal Law ⇐1208.4(2)

In rejecting defendant's compromise offer of restitution and imposing of requirement that defendant make full restitution under the Victim and Witness Protection Act, district court was not required to make explicit finding regarding compromise offer; restitution in full is to be considered norm thus not requiring explicit findings whereas restitution in part is deviation from that norm requiring explanation on record. 18 U.S.C.(1982 Ed.) § 3579(a)(2); Fed.Rules Cr.Proc.Rule 35, 18 U.S.C.A.

Lucien B. Campbell, Federal Public Defender, San Antonio, Tex., for defendant-appellant.

Michael R. Hardy, LeRoy Morgan Jahn, Daniel Maeso, Asst. U.S. Attys., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Frasiel L. Hughey pleaded guilty to one count of illegal credit card use out of a six count indictment, pursuant to a plea bargain. Hughey now appeals the denial of his Fed.R.Crim.P. 35 motion to correct his sentence on the ground that it was error for the trial court to order him to pay restitution beyond that attributable to the one criminal act of which he pleaded guilty. He claims the amount of restitution assessed exceeds that authorized by the Victim and Witness Protection Act (the "VWPA") for four reasons: 1) It includes the value of losses caused by crimes of which he was not found guilty. 2) While it is true that a defendant need not be convicted of a particular offense for that offense to figure into restitution calculations in scheme or conspiracy convictions, Hughey was convicted of neither. 3) The wrong standard of proof was applied by the court. 4) The court did not sufficiently consider his indigency in its restitutive assessment. We affirm the trial court's assessment of restitution.

Facts and Prior Proceedings

Hughey was charged in a second superseding indictment with three counts of mail theft (18 U.S.C. § 1709) and three counts of fraudulent use of a credit card (18 U.S.C. § 1029(a)(2)). He pleaded guilty to count IV of the indictment, which alleged that on or about October 18, 1985, he misused a Mastercard issued by MBank to Hershey Godfrey by buying merchandise worth more than $1000.00 with it.

As part of the plea bargain, detailed in a letter to the court by Hughey's attorney, the government agreed to dismiss all the remaining counts of all three indictments and not to prosecute Hughey for "any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." The plea bargain was silent regarding restitution. The government offered as the factual basis for the guilty plea that Hughey was a postal employee, that one of his tasks was to place undelivered MBank credit cards in a specific San Antonio Post Office box, and that he had stolen the undelivered Godfrey credit card "as well as a number of other cards adding to more than 15 in number." Hughey specifically advised the court that he was not acknowledging or responding to any allegations other than count IV (misuse of the Godfrey credit card).

When taking the guilty plea, the court notified Hughey that it could impose restitutive obligations in addition to other penalties. After the plea but before sentencing, Hughey was notified by the United States Probation Office that restitution of $147,646.89 might be sought at the time of sentencing. Hughey objected to this figure, and the government submitted a revised figure of $90,431, which was derived by adding up the losses resulting from unauthorized use of 21 credit cards issued by MBank to 19 individuals, including the Godfrey card.

In a hearing prior to sentencing, the government offered a stipulation of the testimony of witnesses that the government could produce who would testify with regard to Hughey's responsibility for the misuse of the 21 credit cards.[1] The defense made no objection but noted that this was a stipulation as to expected testimony, not fact.

In response to the government's proposed figure, Hughey offered to make restitution of $10,412, which he claimed was the sum representing the total loss caused by the unauthorized use of the Godfrey credit card. He argued that he could not be legally held responsible for any greater restitution under the VWPA.

On April 2, 1987, Hughey was sentenced to eight years for violation of 18 U.S.C. § 1029(a) (credit card fraud). Pursuant to the VWPA, 18 U.S.C. §§ 3579 and 3580 (1982 and Supp. IV 1986) (current versions at 18 U.S.C. §§ 3663 and 3664),[2] he was ordered to make restitution to MBank of $90,431.

1. As this stipulation formed the basis for the restitutive order (and the current appeal), it is useful to detail what facts the government planned to offer. The stipulations consisted of the following:
   1) A Secret Service agent would testify that Clarence Thompson told him that Hughey gave Thompson 15 Visa or Mastercharge cards issued by MBank, and admitted to getting these cards from the post office where he worked.
   2) A Postal Inspector would testify that "a business person" identified Hughey as having used an MBank Mastercharge card issued to James Windom.
   3) Hughey's Postal Supervisor would testify that Hughey had access to the MBank post office box.
   4) An investigator for MBank would testify that:
      a) Thomas Beatty said Hughey provided him with a total of 3 MBank charge cards.
      b) "Business persons identified the defendant in possession" of 2 additional MBank charge cards.
      c) All of the listed charge card holders, totaling 19, reported charges they had not made on their cards (totalling 21—two of the cardholders each had two cards unappropriated), which they had not received in the mail.
      d) The cards had all been addressed to people who had moved. The envelopes which held the cards were marked, "Do not forward—Return to sender, P.O. Box 2428, San Antonio, TX. 78298" (the P.O. Box Hughey had access to.)
      e) The total losses on the 21 cards from unauthorized charges was $90,431.

2. 18 U.S.C. § 3579 and § 3580 have since been recodified at 18 U.S.C. §§ 3663 and 3664, respectively. However, the application of the statute as in force at the time of Hughey's sentencing is what is challenged. It is that version of the statute which we must apply. Hence, for the sake of clarity, we will refer throughout this opinion to §§ 3579 and 3580.

Hughey appeals the trial court's denial of his "Motion to Reduce Sentence and to Correct an Illegal Sentence" made under Fed.R.Crim.P. 35. In that motion he challenged the trial court's assessment of restitution as illegal under the VWPA. The trial court stated, when denying Hughey's motion in its order of October 7, 1987:

> The total loss in dollars caused to the issuing banks was $90,431. Although defendant Hughey did not himself benefit in that sum, the loss to the issuing banks in that amount was caused by the fact that he used the credit cards or caused them to be used. The Court finds that a preponderance of the evidence supports the award of restitution.

The court also stated that while it had considered Hughey's indigency, it was convinced that the award was appropriate.

I. Restitution for Acts for Which the Defendant Was Not Convicted.

A. *Standard of Review*

[1] In reviewing the denial of a rule 35 motion, this Court will "examine only whether the sentence was illegal or whether the district court abused its discretion." *U.S. v. Kirkland*, 853 F.2d 1243, 1246 (5th Cir.1988). The legality of a criminal sentence is examined on a *de novo* basis. *See U.S. v. Pomazi*, 851 F.2d 244, 247 (9th Cir.1988). Because Hughey challenges the legality of his criminal sentence, we review *de novo*.

May a defendant, charged with multiple offenses, who pleads guilty to one offense be required to make restitution under the VWPA for acts of which he was not found guilty? This is the critical issue before us. We find statutory language, history, and case authority all support a trial court's authority to assess restitution under the VWPA in appropriate circumstances for losses beyond those attributable to the offense of conviction.

B. *Statutory Language and History*

[2] Section 3579 of the VWPA refers to "a defendant convicted of an offense" and "any victim of such offense."[3] Section 3580 refers to "the amount of the loss sustained by any victim as a result of the offense."[4] The difficulty here is that the term "offense" is not defined independently. Hence the statute is ambiguous, and we must give the term meaning.

The reference in § 3579 to "such offense" and the repeated references to "the" property by themselves admittedly point to a maximum restitution determined by the loss attributable only to the offense of conviction and "perhaps for the proposition that the charging instrument establishes the maximum amount of that loss."

3. The applicable sections of the VWPA were codified at 18 U.S.C. §§ 3579 and 3580. They were then amended twice, so that the relevant portions of § 3579 in force on April 2, 1987 (date of Hughey's sentencing) read as follows:

> § 3579. *Order of restitution*
>
> (a)(1) The court, when sentencing a defendant convicted of an offense under this title ... may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense ....
>
> (b) The order may require that such defendant—
>
> (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—
>
> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> (i) the value of the property on the date of the damage, loss, or destruction, or
>
> (ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;....

18 U.S.C. § 3579 (1982 and Supp. IV 1986) Pub.L. 99-646, § 79(a) (1986), amended Subsection (a)(1), changing "the offense" to "such offense."

See 18 U.S.C. §§ 3579 (Supp. IV 1986).

4. § 3580. *Procedure for issuing order of restitution:*

> (a). The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

United States v. Berrios, 869 F.2d 25, 28 (2nd Cir.1989).

Two procedural provisions of the VWPA, however, suggest a more open-ended application of the term "offense" was intended. Section 3580 provides that "the court, in determining ... the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense," and that it shall consider "such other factors as the court deems appropriate." 18 U.S.C. § 3580(a). It is obvious that the amount of loss may be more than that stated in the charging instrument. Therefore, at the minimum, the VWPA does not limit restitution to the amount specified in an indictment. Furthermore, the amount of loss is put forward as only one factor that the court must consider. The statute obviously gives a sentencing court some discretion in determining the proper restitutive amount. *See Berrios*, 869 F.2d at 29.

Section 3580(e) provides for estoppel in subsequent civil proceedings:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

18 U.S.C. § 3580(e) (1982). If Congress had intended to limit the amount of restitution to that attributable to the offense of conviction, subsection (e) would not have needed to employ the phrase "for an offense involving the act giving rise to restitution" but instead could have simply stated "for an offense giving rise to restitution." The phrase "involving the act" would be useless surplusage if such a limited reading was intended. It is our duty to give effect to every clause and word of a statute, if possible. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431 (1883)). Inclusion of the phrase "involving the act" "implies that the acts for which restitution may be ordered must be related to the offense of which defendant is convicted, but that those acts may extend beyond the boundaries of the offense itself." *Berrios*, 869 F.2d at 29.

An analysis of the history of the VWPA further confirms a broader reading of the term "the offense." If "offense" was meant to be limited purely to the offense for which defendant is convicted, the VWPA could have been written as was the Federal Probation Act (FPA). The FPA provided that a defendant "[m]ay be required to make restitution ... to aggrieved parties for ... loss caused by the *offense for which conviction* was had." 18 U.S.C. § 3651 (1982) (repealed effective November 1, 1986, pursuant to § 235 of Pub.L. 98-473) (emphasis added). The VWPA contains no such limiting language. *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986); *see also Berrios*, 869 F.2d at 28-29.

Even under the more restrictive language of the FPA there was a division among the Circuit Courts on whether restitution was in fact limited to the amount charged in the indictment. *Compare United States v. McMichael*, 699 F.2d 193, 195 (4th Cir.1983) (allowing restitution outside of amount alleged in indictment, as long as it was an actual damage directly caused by illegal activity with which defendant was charged) *with United States v. Black*, 767 F.2d 1334, 1343 (9th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985) (limiting restitution to amounts alleged in indictment) and *United States v. Hawthorne*, 806 F.2d 493, 501 (3rd Cir. 1986) (restitution limited to losses attributable to offense of conviction). Congress must have been aware that such a limitation was placed on the FPA by some courts. Given the absence of any limiting language in the VWPA, it is reasonable to infer that Congress did not intend to limit victim compensation to the amount specified in the indictment. *Hill*, 798 F.2d at 405.[5]

5. This Court has explicitly held that district courts have the authority "to order a defendant to pay restitution in an amount greater than the loss alleged in the indictment." *United States v.*

Furthermore, it is clear from the legislative history of the VWPA that one of the principal purposes of the Act was to ensure that wrongdoers, to the degree possible, make their victims whole. *See* S.Rep. No. 532, 97th Cong., 2nd Sess. 30, *reprinted in* 1982 U.S.Code Cong. & Admin. News 2515, 2536–37. That such was a principal purpose of the VWPA has been repeatedly recognized by numerous appellate courts. *See United States v. Duncan*, 870 F.2d 1532, 1535 (10th Cir.1989); *Berrios*, 869 F.2d at 29–31; *United States v. Pomazi*, 851 F.2d 244, 248–49 (9th Cir.1988); *Hill*, 798 F.2d at 405–407; *United States v. Anglian*, 784 F.2d 765, 767–68 (6th Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986).

Given the compensatory objectives of the VWPA, it is difficult to justify limiting restitution to either the particular counts or amounts charged in the indictment. It is important to note that a prosecutor's decision regarding the number of counts with which to charge a defendant is discretionary. Factors may figure into that determination which have little or nothing in common with the congressional objective of compensating crime victims. The decision as to which counts should be the subject of prosecution may be based upon office policy, the strategic use of certain criminal transactions as evidence, or evidentiary considerations geared to securing convictions based on a "beyond a reasonable doubt" standard. Usually of less immediate concern is the victims' financial loss, which is judged by the less onerous "preponderance of the evidence" standard.

Finally, if restitution were limited to the count of conviction, given the high levels of plea bargaining within our criminal system, in the majority of cases a victim could not be made whole. Congress was not unaware of the pervasive phenomenon of plea bargaining when it passed the VWPA. It is not persuasive to attribute Congress with its stated intent of providing for the full restitution of victims yet simultaneously shaping the statute so that it could be rendered substantially nugatory through plea bargaining. *See Berrios*, 869 F.2d at 30. We therefore find that both the statutory language and history affirm a trial court's power to assess restitution for losses caused by offenses not charged in the indictment.

C. *Case Authority*

Hughey's case presents a specific set of circumstances which are of first impression in this Circuit. It requires restitution under the VWPA for a loss greater than that attributable to the offense of conviction when: (1) the defendant was charged with multiple offenses, and the various counts are similar to each other; (2) the plea bargain was silent on the issue of restitution; (3) the defendant did not acknowledge the government's proposed restitutive figure as correct, but neither did he challenge the amount put forward; (4) each of the offenses which were not charged in the indictment but form the basis for the restitutive amount involved the same defendant, the same victim, and the same type of crime; (5) none of the counts, however, alleged a conspiracy or scheme.

Case authority in other circuits supports the broader interpretation of the term "offense" in circumstances such as Hughey's. Both the Second and Tenth Circuits have held that restitution under the VWPA is not limited to the offense of conviction in cases in which the factual circumstances closely parallel Hughey's. *Berrios*, 869 F.2d 25 (2nd Cir.1989); *United States v. Duncan*, 870 F.2d 1532 (10th Cir.1989). *See also United States v. Spambanato*, 876 F.2d 5 (2nd Cir.1989) (applying *Berrios* in parallel circumstances). In *Berrios* the defendant pleaded guilty to one count of mail theft and the other counts were dropped. The Second Circuit held beyond cavil that the district court had the authority to order Berrios to make restitution of the full amount of loss attributable to his related criminal course of conduct as long as he was forewarned such restitution might be ordered and he was given an opportunity to contest any allegations as to the amount of loss he was supposed to have caused. *Berrios*, 869 F.2d at 32.[6]

Similarly in *Duncan*, after an analysis of the language and purpose of the VWPA, the Court concluded:

> [T]he VWPA does not restrict a sentencing judge to considering only those acts for which conviction was had, or for which the defendant pleaded guilty. The judge ordering restitution under the VWPA is free to look beyond the indictment to other acts committed by the defendant that caused a loss to the victim....
>
> ....
>
> ... the VWPA does not prohibit an award of restitution based upon criminal activity that does not encompass the elements of the crime for which the defendant pleaded guilty, if there is a sufficient connection between such crimes.
>
> We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for such losses resulting from such acts if the Government can prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

Duncan, 870 F.2d at 1536–37.

Hughey argues that restitution for losses beyond those attributable to the offense of conviction may be ordered only if the offense of conviction involved either a conspiracy or a "scheme." In such circumstances, it is conceded that the non-convicting offenses may be considered part of or in furtherance of the offense of conviction. But, the rule the *Duncan* Court fashioned and then employed did not rely on the "scheme" rationale, although Duncan's offense of conviction was mail fraud, which has been found to involve a "scheme." *See United States v. Angelica*, 859 F.2d 1390 (9th Cir.1988); *United States v. Pomazi*, 851 F.2d 244, 249 (9th Cir.1988). *Duncan* did refer to a "scheme" but only to establish that the forgery of check endorsements was closely enough related to the mail fraud conviction to allow broader restitution:

> Although the precise contours of the scope of "offense" under the VWPA must be determined under the facts of each case, *we interpret the VWPA to permit an order of restitution for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered*, when there is a *significant* connection between those other criminal acts and the crime for which the guilty plea was entered.

Duncan, 870 F.2d at 1536 (emphasis added). As long as there is a *significant* connection between the crime of conviction and the other offense, there is no requirement that a conspiracy or scheme need be shown to justify restitution beyond the offense of conviction.

The Second Circuit held that the VWPA did not "limit the sentencing court's restitutionary [sic] authority to the amount specified in the charge on which the defendant is convicted where the victim of that offense also suffered other losses as a result of the defendant's related course of conduct." *Id.* at 32. The Court held that the amount of loss must "either be conceded by the defendant or be adjudicated by the court." *Id.* Thus even if the *Berrios* decision relied to some extent on Berrios' concessions, the rule as fashioned by the Court applies to cases such as Hughey's where the defendant is completely silent regarding the criminal acts alleged to have caused loss, and the court determines the amount of loss independently.

Kirkland, 853 F.2d 1243, 1250 (5th Cir.1988). *Kirkland* is not dispositive beyond its facts, however, because the restitutive amount was specifically addressed in the plea bargain to which the defendant agreed. This is distinguishable from Hughey's case, because Hughey's plea bargain was silent on the issue of restitution.

6. It might be argued that *Berrios* is distinguishable from the circumstances of Hughey's case because the *Berrios* Court found and relied in part on the fact that Berrios acknowledged guilt for the criminal acts of which he was not convicted. The Court made much of the fact that Berrios acknowledged responsibility for his victim's entire loss in order to receive a lenient sentence. *Berrios*, 869 F.2d at 32–33. While this is true, Berrios contended throughout the trial and appellate proceedings that although he had a "moral obligation" to repay the full amount, he did not concede liability for, nor agree to make restitution of, any amount higher than the sum charged in the information to which he pleaded guilty. *Id.* at 28.

Two other cases, while not duplicating Hughey's factual situation, support the trial court's order of restitution: *Hill*, 798 F.2d 402 (10th Cir.1986); *Pomazi*, 851 F.2d 244. The *Hill* court held:

> [I]n determining the amount of loss to a victim for purposes of awarding restitution under the VWPA, a district court *is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment* .... [A] district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense," 18 U.S.C. § 3580(a), so long as this amount is supported by a preponderance of the evidence.

Hill, 798 F.2d at 406 (emphasis added). *Hill* is distinguishable from the case at hand because the defense attorney acknowledged the accuracy of the court's restitutive amount and there was no plea bargain. Nevertheless, the court laid down the same broad rule which we employ in this case.

In *Pomazi*, the Ninth Circuit ordered restitution to numerous victims of the defendant's mail fraud scheme, although, pursuant to a plea bargain, the defendant was convicted of only two counts of mail fraud involving one victim. Hughey argues that *Pomazi* employs the scheme rationale because it only addresses cases in which "the crime charged involves a scheme to defraud" in its final holding, and hence it is not directly on point. *Id.* at 250. The broad rule and the logic it employs, however, provide strong support for the decision of the district court in this case.

Hughey urges as countervailing authority three cases: *United States v. Durham*, 755 F.2d 511 (6th Cir.1985); *United States v. Barnette*, 800 F.2d 1558 (11th Cir.1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987); and *United States v. Mischler*, 787 F.2d 240 (7th Cir.1986). In *Durham* the Sixth Circuit held restitution could only be ordered for the offense of conviction, a narrower reading of the term "offense" than the District Court employed in the case before us. The *Durham* court, however, also held the term "victim" was intended to be interpreted broadly. Hence, the Sixth Circuit found that "Congress intended a 'victim' to be a person who suffered injury as a result of the defendant's actions that surrounded the commission of the offense, regardless of whether the actions are elements of the offense charged." *Durham*, 755 F.2d at 513. Durham pleaded guilty to bank robbery but challenged the court's authority to order restitution for arson which destroyed an automobile during the course of the robbery. Although Durham was not convicted of arson, because the arson was committed and the car destroyed during the course of his escape from the bank robbery, the insurer of the automobile was considered a victim of Durham's offense of conviction.

The Sixth Circuit employed similar logic in *United States v. Mounts*, 793 F.2d 125 (6th Cir.), *cert. denied*, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986). Mounts pleaded guilty to one count of illegally receiving explosives. He was ordered to make restitution for the damage to a company whose safe he attempted to blow up and whose automobile he destroyed in his attempt to escape. The district court awarded restitution based on the losses related to the business equipment and the stolen automobile. As the Tenth Circuit pointed out in *Duncan*,

> Although the Sixth Circuit purports to apply a restricted definition of "offense," [footnote omitted] we believe that the result in *Mounts* regarding restitution for damage to the stolen Corvette and for losses attributable to stolen business property is consistent with the definition of 'offense' applied in *Hill* and *Pomazi*. This result demonstrates that the VWPA does not prohibit an award of restitution based upon criminal activity that does not encompass the elements of the crime for which the defendant pleaded guilty, if there is a sufficient connection between such crimes.

Duncan, 870 F.2d at 1537. We agree with this interpretation of *Mounts* and *Durham*, believing (with the Tenth Circuit) that *Mounts* and *Durham* support our interpretation of the VWPA because the narrow definition of "offense" was "effectively obliterated" by applying the broad definition of "victim." *Id.* at 1537 n. 2. To the extent that the narrow definition of "offense" might limit restitution under the VWPA, however, we decline to accept the reasoning of the Sixth Circuit.

Hughey's Eleventh Circuit case, *Barnette*, states that the amount of restitution under the VWPA and FPA "may not exceed the actual losses flowing from the offense for which the defendant has been convicted." *Barnette*, 800 F.2d at 1571–72. The *Barnette* Court, however, applied its holding to both the FPA and the VWPA in its two paragraph consideration of the issue, and did not cite any VWPA case as authority. It did not address the VWPA provisions separately. Given the differences between the two acts, we find *Barnette* not clearly in point.

Finally, the Seventh Circuit case cited, *Mischler*, 787 F.2d 240, is not applicable to the facts of our case. The trial court was held to have abused its discretion in ordering broad scale restitution for all counts of the indictment. The Mischlers, unlike Hughey, challenged the factual accuracy of the restitutive amount assessed, but were not given an opportunity to elaborate the basis for their challenge. The district judge was also found not to have relied on accurate information in determining the restitution. No such inaccuracy of calculation has been shown or alleged by Hughey.

A stronger case for Hughey's position from the Seventh Circuit is *United States v. Paul*, 783 F.2d 84 (7th Cir.1986). Paul pleaded guilty to embezzlement and was ordered to make restitution of a greater amount than she had admitted to having embezzled. She failed to object to the computation of the amount of restitution at the time of sentencing (unlike the Mischlers). *Paul* held, however, that when imposing restitution greater than that charged in the relevant count, the defendant must obtain the proceeds "as part of an ongoing scheme to defraud which extends over time, and ... the amount of damages to the victim [must be] established with specificity and [be] admitted to by the defendant in the indictment, the plea agreement and presentence proceedings." *Paul*, 783 F.2d at 88. This rule was first enunciated in *United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir.1982). The *Paul* Court explicitly concluded that:

> [T]he government's interest in leaving the precise amount of restitution undetermined until the sentencing stage is very slight.... [T]he interests of due process and fairness to the defendant require that the government satisfy the *Davies* test at the plea bargaining stage before an amount of restitution greater than that charged can be ordered.

Paul, 783 F.2d at 89. To the extent that the *Davies* test, as employed in *Paul*, would prevent a district court from ordering restitution under the VWPA greater than that charged in the indictment, we find it would cripple proper application of the VWPA.

We conclude that the VWPA permits a court to require restitution beyond that amount involved in the offense of conviction when there is a significant connection between the crime of conviction and similar actions justifying restitution. This is the law also of the Second, Ninth, and Tenth Circuits as seen in *Berrios*, *Pomazi* and *Duncan*, respectively. We do not need in the case before us further to define at this time what constitutes a "significant connection" between the offenses of indictment or conviction and those additional acts for which restitution was ordered. In this case, the nexus is strong. Here the restitution order involved the same defendant, the same victim, and multiple identical criminal offenses.

II. Standard of Proof and Sentencing Procedure

[3] Hughey argues that imposition of restitution pursuant to the VWPA imposes "criminal responsibility" for the offenses which form the basis of the restitutive order. Hence, he maintains that the preponderance of the evidence standard is inapplicable and that he must be found guilty of these offenses under the criminal standard of "beyond a reasonable doubt."

This argument is made without citation to any authority and misconstrues the purpose of the VWPA. The purpose of the Act is restitutive, and restitution is assessed as part of sentencing. It is not a finding of "criminal responsibility." The VWPA clearly provides for a preponderance of the evidence standard of proof. 18 U.S.C. § 3580(d).[7]

Hughey's standard of proof argument, however, does raise the issue of what procedural safeguards are required before restitution can be imposed for offenses which are not the basis of a conviction. Under the VWPA a court may order restitution to any victim, § 3579, based on information gathered and furnished by the probation service, § 3580. Pursuant to Rule 32 of Fed.R.Crim.P., the presentence report furnished by the probation service must contain information about the financial harm or loss suffered by any victim. That report must be timely disclosed to the defendant who may challenge any factual inaccuracy it contains. *United States v. Patterson*, 837 F.2d 182, 183 (5th Cir.1988). In addition, the defendant must be forewarned that restitution may be ordered in an amount higher than the crime of conviction, and he must be given an opportunity to contest any allegation as to the amount of loss he has supposed to have caused. *United States v. Corn*, 836 F.2d 889, 893–94 (5th Cir.1988); *Berrios*, 869 F.2d at 32; *Mischler*, 787 F.2d at 246–47. *See also* Fed.R.Crim.P. 11(e)(1). However, "nothing in the text or legislative history of the VWPA [indicates] that Congress intended the sentencing hearing to be transformed into a second trial on the issue of restitution." *United States v. Cloud*, 872 F.2d 846 (9th Cir.1988).

[4, 5] Hughey was notified ahead of time that the broader restitution would be sought. His attorney briefed these issues well in presentence hearings. Hughey was not the victim of any unfair surprise. The government bears the burden of proving the amount of loss sustained by the victim, but the burden of demonstrating the defendant's lack of financial resources is upon him. § 3580(d). The government in this case came forward with proffered testimony for the purpose of proving the amount of financial loss for which Hughey was responsible. Hughey stipulated that this testimony was admissible, and while he did not admit that any of it was true, neither did he dispute the accuracy of the calculation of the amounts proposed. Given the testimony, the government clearly met its burden of proving the losses by the preponderance of the evidence. The burden then shifted to the defendant to challenge that estimate of loss. He did not do so. It is unacceptable for a defendant to be able to agree to a plea bargain and then by maintaining his silence, thwart the VWPA's restitutive purpose in the face of persuasive evidence of losses he has caused.

In the absence of any challenge to the accuracy of the district court's assessment, we need not further explore any constitutional claim on this ground. *Durham*, 755 F.2d at 514.

III. Defendant's Financial Resources

Finally, Hughey argues that the court did not properly assess his indigency, and that it did not give adequate consideration to a "compromise" figure which he proposed for restitution. In failing to do so, he urges, the court did not build an adequate record for consideration upon appeal. These claims can be refuted with brevity.

[6] First, the Act states that the sentencing court shall consider the amount of loss sustained by any victim, the financial resources of the defendant, his financial needs and earning ability, the needs of his dependents, "and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a). The defendant's financial resources are only one factor to be considered in a nonexhaustive list provided by the statute.[8] Another factor which may be considered is the culpability of the defendant. *United States v. Anglian*, 784 F.2d 765, 768 (6th Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986). We have recently held that indigency does not bar a restitutive award under the VWPA. *United States v. Ryan*, 874 F.2d 1052, 1054–55 (5th Cir.1989). *See also Mounts*, 793 F.2d at 128. Furthermore, the trial judge had Hughey's financial information at his disposal, and stated that he had examined it. This demonstrates sufficient consideration of the statutory factor. *United States v. Atkinson*, 788 F.2d 900, 902 (2nd Cir.1986).

[7] Hughey offered to pay for all losses attributable to the Godfrey credit card, the credit card used in the offense to which he pleaded guilty. The district court, however, required him to make restitution in full for all offenses for which the government offered proof as against the same victim, the bank. The VWPA provides that "[i]f the court does not order restitution, or orders only partial restitution under this section, the court shall state on the record the reasons therefore." 18 U.S.C. § 3579(a)(2). There is no mention in the statute of any requirement that a court must also state on the record reasons for ordering full restitution. It is apparent from the statute that restitution in full is to be considered the norm. Restitution in part is a deviation from that norm and requires an explanation in the record. Nevertheless, *Hughey* argues that explicit factual findings should have been made by the district court in reference to his compromise offer.

We have recently held that:

> The decision to assign reasons is committed to the sound discretion of the district court, guided by this singular inquiry—absent an assignment of its reasons, does the record contain sufficient data for the appellate court to perform its mandated review? If the record provides an adequate basis for that review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.

Patterson, 837 F.2d at 183–84. The record in this case contains a presentence investigation report by the United States Probation Office, which detailed the defendant's financial resources. Coupled with the district court's detailed order (which denied the defendant's Rule 35 motion) and the government's offer of proof, an adequate record on which to review this case was provided. *See Ryan*, at 1054. Given the record in this case, there was no need for an explicit finding by the district court regarding the compromise offer. *Patterson*, 837 F.2d at 184. *See also United States v. Cannizzarro*, 871 F.2d 809, 810–11 (9th Cir.1989). The defendant's assertion that there is not an adequate record for this Court to perform its appellate review is without merit.

Conclusion

Hughey's guilty plea to the one offense of misuse of a credit card, in conjunction with the government's offer of proof, formed a sufficient basis for the district court to order restitution. The restitution order properly exceeded the amount involved in the offense for which conviction was obtained since the restitution ordered had a "significant connection" with the conviction offense. The proper standard of proof was employed by the district court, and there was a sufficient record upon which to base the order of restitution. The

7. 18 U.S.C. § 3580(d) (1982) provides:
> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

8. 18 U.S.C. § 3580(a) (1982) provides:
> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

district court's denial of Hughey's rule 35 motion must be affirmed.

AFFIRMED.

Myrtis Faye TERRELL,
Plaintiff-Appellant,

v.

Raymond J. DeCONNA and DeConna Ice Cream Company, Inc., et al.,
Defendants-Appellees.

No. 88-4445.

United States Court of Appeals,
Fifth Circuit.

July 27, 1989.

Wife brought suit against van driver and alleged owner of van seeking to recover damages for loss of consortium for injuries her husband suffered in collision with van, and against insurer seeking declaration as to insurance coverage applicable to driver and alleged owner. Action was initiated in state court and removed to the United States District Court for the Southern District of Mississippi, Walter J. Gex, III, J., which entered judgment for wife against driver and in favor of alleged owner, and construed the insurance contract. Wife appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) wife's loss of consortium claim was barred under doctrine of issue preclusion; (2) wife had no right to jury trial of declaratory action to determine insurance contract; and (3) District Court's finding that driver of van was not himself a named insured under master policy, and that van was not owned by a named insured because it was owned by either driver or his brother, neither of whom was a named insured, was supported by sufficient evidence.

Affirmed.

1. **Federal Civil Procedure ⇐758**

Motion to dismiss was sufficient to raise defense of issue preclusion.

2. **Federal Courts ⇐420**

When federal court renders decision in diversity case, preclusive effect of decision is measured by federal principles of preclusion.

3. **Judgment ⇐715(1), 720, 724**

Party is prevented from relitigating issues provided: that issue at stake was identical to one involved in prior litigation; that issue was actually litigated in prior litigation; and determination of issue in prior litigation was critical and necessary part of judgment in that earlier action.

4. **Judgment ⇐665**

Complete identity of parties in the two suits is not required for application of issue preclusion.

5. **Judgment ⇐632, 707**

Defense of issue preclusion subject to certain conditions, may be invoked by nonparty against party to prior suit, and, in limited instances, against nonparty by party to prior suit.

6. **Judgment ⇐677**

Federal courts will bind nonparty whose interests were represented adequately by party in prior suit.

7. **Judgment ⇐677**

Wife's loss of consortium claim predicated upon accident that formed basis for earlier suit by injured husband was barred under doctrine of issue preclusion, because wife's interests were adequately represented in prior suit.

8. **Jury ⇐14(12.5)**

Factual issues relevant to question of insurance coverage were appropriately tried to the court, because nondeclaratory antecedent to the suit would necessarily have come under Mississippi's garnishment statutes and would have been tried to the court. Miss.Code 1972, §§ 11-35-1, 11-35-45.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

FRASIEL L. HUGHEY,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this court, certifies that pursuant to Rule 28.3, Supreme Court Rules, he served the within Motion for Leave to Proceed in Forma Pauperis and the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit on the counsel for Respondent by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

The Honorable Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Antonio, Texas, on September 25, 1989 and further certifies that all parties required to be served have been served.

LUCIEN B. CAMPBELL

ORIGINAL

No. 89-5691

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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FRASIEL L. HUGHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly ordered petitioner, who pleaded guilty to one count of fraudulent use of a credit card, to make restitution to the issuer of the credit card for its losses caused by petitioner's overall course of conduct involving the issuer's credit cards.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-5691

FRASIEL L. HUGHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 877 F.2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1989, and the petition for a writ of certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of fraudulent use of a credit card, in violation of 18 U.S.C. 1029(a)(2). He was sentenced to eight years' imprisonment. He also was ordered to pay $90,431 in restitution under the Victim and Witness Protection Act, 18 U.S.C. 3579(a), to the bank that issued the credit card. Petitioner filed a motion under Fed. R. Crim. P. 35 to correct his sentence to limit restitution to the amount of the losses caused by the acts underlying the single count to which he pleaded guilty. The district court denied that motion, and the court of appeals affirmed. Pet. App. 1-12.

1. The facts are summarized in the opinion of the court of appeals. During 1985 and 1986, while petitioner was a postal

employee in San Antonio, Texas, he stole and used a number of credit cards issued by MBank USA after those cards had been returned to the Post Office as undelivered mail. At least 21 credit cards were involved, with total losses to MBank of more than $90,000. In a second superseding indictment, petitioner was charged with three counts of mail theft (18 U.S.C. 1709) and three counts of fraudulent use of a credit card (18 U.S.C. 1029(a)(2)). The crimes charged in the indictment involved five of the stolen credit cards. Pet. App. 2-3.

Petitioner pleaded guilty to one count of fraudulent use of a credit card issued to Hershey Godfrey. The losses to MBank from that one card totaled $10,412. As part of the plea agreement, the government dismissed the remaining counts and agreed not to prosecute petitioner "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." Pet. App. 3.

At petitioner's sentencing, the government sought an order of restitution under the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3579(a). See note 2, infra. In support of its motion, the government offered a stipulation of testimony showing that petitioner was responsible for $90,431 in losses to MBank resulting from unauthorized charges on 21 credit cards that petitioner had stolen from the Post Office. See Pet. App. 3 n.1. Petitioner made no objection, although he noted that the stipulation was only to expected testimony, not fact. The district court ordered restitution under the VWPA for the full amount supported by the stipulation of testimony, $90,431. Pet. App. 3.

2. Petitioner then filed a motion under Fed. R. Crim. P. 35 to correct his sentence, arguing that the district court exceeded its authority under the VWPA by ordering restitution in an amount greater than the loss caused by petitioner's unauthorized charges on the Godfrey credit card alone. That motion was denied by order dated October 7, 1987. Pet. App. 4.

3. The court of appeals affirmed the district court's denial

of relief under Rule 35. Pet. App. 1-12. The court interpreted the VWPA to permit restitution for losses caused by petitioner's entire course of credit-card fraud involving MBank, not merely the specific violation to which he pleaded guilty. Pet. App. 4-6. The court found support for this holding in the text, legislative history, and purposes of the restitution provisions of the VWPA, id. at 4-6, and the decisions of other courts of appeals. Id. at 6-9. The court relied in particular on United States v. Duncan, 870 F.2d 1532 (10th Cir.), cert. denied, 110 S. Ct. 264 (1989), in holding that the VWPA "permits a court to require restitution beyond that amount involved in the offense of conviction when there is a significant connection between the crime of conviction and similar acts justifying restitution." Pet. App. 9. The court found that the appellate decisions cited by petitioner in support of a restrictive reading of the VWPA either were consistent with a broader reading of the statute or involved issues distinct from the scope of the district court's restitution authority. Id. at 8-9.

ARGUMENT

Petitioner contends (Pet. 6-12) that the district court improperly awarded restitution for losses to MBank that resulted not only from the criminal violation to which he pleaded guilty, but also from other similar acts that were part of the same scheme of wrongdoing involving credit cards issued by that bank. The court below correctly rejected that claim. This Court recently denied review in another case raising the same issue, Duncan v. United States, No. 88-7294 (Oct. 10, 1989), and there is no reason for a different disposition here. 1/

1.a. Under the VWPA, the sentencing court is authorized to order "that the defendant make restitution to any victim of the offense." 18 U.S.C. 3579(a) (1982). 2/ The purpose of the VWPA

1/ We have furnished counsel for petitioner with a copy of our brief in opposition in Duncan.

2/ The restitution provisions of the VWPA were originally codified at 18 U.S.C. 3579 and 3580, but they were redesignated as 18 U.S.C. 3663 and 3664 (Supp. V 1987) by the Sentencing

(continued...)

is to redress injuries to a victim that are caused by the defendant's criminal conduct. As the Senate Report explained, the VWPA is designed to require defendants "to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982). "The premise of * * * [this] section is that the court in devising just sanctions for adjudicated offenders, should insure that the wrongdoer makes good[], to the degree possible, the harm he has caused the victim." Ibid. This legislative history is consistent with the statutory purpose set forth in the VWPA itself: "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." VWPA, Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248, 18 U.S.C. 1512 note. 3/

In light of the broad remedial purposes of the VWPA, the court of appeals properly construed Section 3579(a) to authorize restitution for injuries sustained as a result of criminal acts that have a "significant connection" to the acts underlying the particular count on which the defendant was convicted. Pet. App. 9. Accord United States v. Duncan, 870 F.2d at 1536; see also United States v. Pomazi, 851 F.2d 244, 249 (9th Cir. 1988), quoting United States v. Davies, 683 U.S. F.2d 1052, 1055 (7th Cir. 1982)("in cases which involve a continuing scheme to defraud, 'it is within the power of the court to require

---

2/ (...continued)
Reform Act of 1984, Pub. L. No. 98-473, Title II, §§ 212(a)(1) and (2), 98 Stat. 1987. The repeal and redesignation apply only to offenses committed after November 1, 1987. Id. § 235(a)(1), 98 Stat. 2031, as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 3599, and Pub. L. No. 100182, § 2, 101 Stat. 1266. Petitioner's offenses occurred during 1985 and 1986, and his sentencing therefore was governed by the VWPA as formerly codified at 18 U.S.C. 3579 and 3580. For this reason, we will cite to those sections, as did the court of appeals.

3/ Petitioner does not contend that the restitution order violated his constitutional rights. Petitioner does assert (Pet. 4, 11) that he was not adequately warned prior to pleading guilty about the potential scope of the restitution order. However, petitioner does not argue that there was a violation of Fed. R. Crim. P. 11, which governs such matters. See also note 5, infra.

restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea'"). By contrast, to limit restitution to losses caused by the specific criminal acts to which the defendant pleaded guilty would be incompatible with Congress's intent, discussed above, to provide victims of crime with adequate compensation.

The text of the VWPA imposes no such limitation. Section 3579(a), as applicable here, provides that "[t]he court, when sentencing a defendant convicted of an offense, may order * * * that the defendant make restitution to any victim of the offense." This language limits restitution to a "victim" of the offense, but it does not prescribe the permissible scope of restitution to a person who is properly found to be a victim. In particular, it does not limit restitution to those injuries that the victim sustained as a result of the criminal acts for which the defendant was convicted, and thereby require the court to ignore (and leave uncompensated) similar acts affecting the same victim that are part of the same overall course of conduct -- i.e., acts that have a "significant connection" to those underlying the count to which the defendant pleaded guilty. This conclusion is reinforced by the fact that the restitution provision of the predecessor Federal Probation Act authorized a court to order the defendant to make restitution for "loss caused by the offense for which conviction was had." 18 U.S.C. 3651 (repealed effective Nov. 1, 1987). As the court below observed (Pet. App. 5), this limiting language was omitted from the VWPA, an omission that manifests a congressional intent not to circumscribe restitution in the manner petitioner urges. See United States v. Berrios, 869 F.2d 25, 29 (2d Cir. 1989); United States v. Hill, 798 F.2d 402, 405 (10th Cir. 1986); cf. United States v. Barany, 884 F.2d 1255, 1257-1258 (9th Cir. 1989). 4/

4/ The conclusion that restitution is not limited to the amount caused by the offense for which conviction was had is also supported by 18 U.S.C. 3580(a), which provides that the court shall consider not only "the amount of the loss sustained (continued...)

b. The restitution order in this case was proper under the standards just discussed. There is no dispute that MBank, which issued the Godfrey credit card, was a "victim" to which the court was authorized to order restitution. It also is clear that the order limited restitution to losses sustained as a result of acts that had a "significant connection" to the criminal violation involving the Godfrey credit card: as the court of appeals explained, petitioner "was charged with multiple offenses, and the various counts are similar to each other," and "each of the offenses which were not charged in the indictment but form the basis for the restitutive amount involved the same defendant, the same victim, and the same type of crime." Pet. App. 6. In short, petitioner's actions pertaining to the Godfrey credit card were part of a single course of conduct involving the theft and fraudulent use of MBank-issued credit cards.

2. Contrary to petitioner's contention (Pet. 7-10), the decision below does not give rise to a circuit conflict warranting reviewing by this Court.

a. As petitioner concedes (Pet. 9-10), the Second and Tenth Circuits have reached the same result as the court below, in essentially identical circumstances. Those courts have held that restitution may be awarded for losses sustained as a result of criminal violations that have a "significant connection" to the particular violations of which the defendant was convicted. United States v. Berrios, supra; United States v. Spambanato, 876 F.2d 5 (2d Cir. 1989); United States v. Duncan, supra; United States v. Hill, supra. As petitioner further concedes (Pet. 8-9), the Seventh and Ninth Circuits have reached a similar result where the conduct for which restitution was ordered was part of the same fraudulent scheme. United States v. Davies, supra; United States v. Paul, 783 F.2d 84, 88 (7th Cir. 1986); United

4/ (...continued)
by any victim as a result of the offense," but also "such other factors as the court deems appropriate." See Pet. App. 5; United States v. Berrios, 869 F.2d at 28-29.

States v. Peredo, 884 F.2d 1029, 1031 (7th Cir. 1989); 5/ United States v. Pomazi, 851 F.2d at 248-249; United States v. Barany, 884 F.2d at 1260. It does not matter that the indictment in this case did not actually charge a scheme to defraud, because it was understood that petitioner's conduct in fact amounted to such a scheme. This understanding is reflected in the plea bargain, in which the government agreed not to prosecute petitioner "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." Pet. App. 3 (emphasis added). The district court expressed the same view in its order denying petitioner's Rule 35 motion. 6/ In any event, the relevant factor for purposes of the scope of a court's restitutionary authority is that the other incidents of unlawful use of a credit card on which the order at issue here was based were "significantly connected" to petitioner's use of the Godfrey

5/ Petitioner relies (Pet. 9, 11) on the statement in Paul, reiterated in Peredo, that the amount of restitution must be established at the time of the plea agreement. However, in the court below, petitioner relied on a similar statement in other Seventh Circuit decisions only for the proposition that sentencing must be based on reliable information, not in support of a jurisdictional-type limitation on the trial court's authority. See C.A. Br. 10-11. Here, the amount of restitution was reliably established by the government's proffered stipulation. See page 2, supra. Moreover, petitioner concedes (Pet. 11) that the district court informed him at the time it accepted his guilty plea that restitution might be imposed. Petitioner's emphasis (Pet. 4-5, 11) on his refusal to admit to the facts in the stipulation of testimony has no bearing on the outcome of this case. Petitioner had the opportunity at the sentencing hearing to present evidence rebutting the testimonial proffer by the government, but he failed to do so. As petitioner appears to concede (Pet. 5), the stipulation of testimony was plainly sufficient to satisfy the preponderance-of-the-evidence standard in 18 U.S.C. 3580(d) for determining the amount of restitution.

6/ The district court stated (10/7/87 Order, at 3-4 (Gov't C.A. Br. Addendum A)):

> Even if the existence of a scheme is a prerequisite to restitution beyond the counts of conviction, the Court finds that this requirement has been satisfied in this case. As a postal employee, [petitioner] Hughey developed a scheme by which he stole credit cards which had been returned to the post office undelivered. He stole at least 21 credit cards and either used them himself or caused them to be used to the detriment of the issuing banks. Even the plea agreement signed by [petitioner's] counsel refers to the "scheme alleged in the indictment."

card, in the sense that all such incidents were part of the same overall course of conduct.

b. Petitioner bases his claim of a circuit conflict (Pet. 8) principally on two Sixth Circuit cases, United States v. Durham, 755 F.2d 511 (1985), and United States v. Mounts, 793 F.2d 125, cert. denied, 479 U.S. 1019 (1986). Those cases, however, did not involve the question presented here: whether a court may order restitution for losses sustained as a result of the defendant's overall fraudulent scheme encompassing the count to which the defendant pleaded guilty.

In Durham, the Sixth Circuit stated that a "natural construction" of the term "offense" would "require that the defendant make restitution only to victims of the offense of which he was convicted." 755 F.2d at 512. Proceeding on that premise, Durham construed the term "victim" to have sufficient breadth to cover restitution orders like the one at issue here, stating that "Congress intended 'victim' to be interpreted very broadly" to include "a person who suffered injury as a result of the defendant's actions that surrounded the commission of the offense, regardless of whether the actions are elements of the offense charged." Id. at 513. It therefore held that the trial court could order restitution for the loss of an automobile that was destroyed during the bank robbery to which the defendant pleaded guilty, even though he was not charged with destruction of the automobile and it was not an element of the offense of bank robbery.

In Mounts, the Sixth Circuit similarly held that the defendant, who pleaded guilty to the receipt of explosives transported in interstate commerce, could be required to make restitution to a company for losses sustained by the use of explosives on its premises, even though he was not convicted of the count charging destruction of those premises. The court also held that restitution could be ordered for damage to an automobile used to escape the scene. The court expressed the view that whether restitution was properly awarded for the latter

purpose "present[ed] a more difficult problem under the restrictive definition of 'offense' in Durham, yet it is easily disposed of under the expansive definition of 'victim,'" because Durham's broad definition of "victim" permits restitution for any harm arising out of "an uninterrupted series of events surrounding the criminal activity" of the defendant. 793 F.2d at 128.

For several reasons, Durham and Mounts do not present a circuit conflict with the decision below that warrants review by this Court. First, the Sixth Circuit's statement that a natural construction of the term "offense" would "require that the defendant make restitution only to victims of the offense of which he was convicted" does not appear to have been intended to limit the scope of a restitution award to a person who has properly been found to be a "victim." Rather, that statement was intended to guide a decision on the threshold question of whether the prospective beneficiary of a restitution order may be regarded as a "victim" in the first place: the court simply made it clear that, in order for a person to qualify as a victim, he must have been injured by the offense of which the defendant was convicted. MBank satisfies that threshold requirement here, because petitioner does not dispute that MBank was injured by his fraudulent use of the Godfrey card. The Sixth Circuit did not discuss the further question, presented here, of what limitations there may be on the amount of restitution that may be ordered to a person who satisfies that threshold and therefore is a "victim."

Second, even if we assume that the Sixth Circuit did intend to address the question as well in Durham and Mounts, it "effectively obliterated" the supposedly narrow definition of the term "offense" by applying a broad definition of "victim," since "the injury caused by 'acts surrounding the offense' clearly contemplates acts other than the elements of the crime for which the defendant was convicted." United States v. Duncan, 870 F.2d at 1537 n.2, quoted in Pet. App. 8-9.

Third, because the Sixth Circuit held that restitution could be ordered in the circumstances presented by Durham and Mounts on the basis of its broad interpretation of "victim," its brief discussion of "offense" was unnecessary to the decision. Neither case involved a scheme or interrelated course of conduct involving similar criminal acts affecting a particular victim -- although, significantly, in each case the Sixth Circuit held, like the court below, that the restitution order need not be limited to losses suffered by acts that constituted elements of the offense of which the defendant was convicted. 1/

1/ Another case cited by petitioner (Pet. 8), United States v. Barnette, 800 F.2d 1158 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987), arose under the Federal Probation Act (FPA) as well as the VWPA. The FPA expressly limited restitution to the "loss caused by the offense for which conviction was had." 18 U.S.C. 3651. As the court below recognized (Pet. App. 5-6), and as petitioner acknowledges (Pet. 6-7), Congress enacted the VWPA because of its dissatisfaction with the restrictive scope and application of the restitution remedy under the FPA.

The Eleventh Circuit stated in Barnette that the amount of restitution under the FPA or VWPA "may not exceed the actual losses flowing from the offense for which the defendant has been convicted." 800 F.2d at 1571. That statement was dictum, however, because Barnette did not involve a challenge to restitution based on conduct other than that underlying the count on which the defendant was convicted, and the restitution order was sustained on the ground that the record established such losses in the amount ordered by the trial court. Moreover, in support of the quoted passage, the court in Barnette cited a prior case arising solely under the FPA, which contained the limiting language quoted above. See United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983). As the court below noted (Pet. App. 9), the Eleventh Circuit apparently overlooked the fact that Congress omitted that limiting language from the VWPA. In light of this oversight and the fact that the statement in Barnette on which petitioner relies was dictum, that passing statement does not give rise to a conflict with the decision below that would warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-5691

In The

Supreme Court of the United States

October Term, 1989

FRASIEL L. HUGHEY

Petitioner,

vs.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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FRASIEL L. HUGHEY V. UNITED STATES
NO. 89-5691

Relevant Docket Entries

09/17/86	41	Filed superseding indictment.
10/22/86	44	Filed plea agreement.
10/27/86		Re-arraignment held. Defendant enters plea of guilty (Count SS4).
12/09/86	45	Motion filed (MOT#16) (Defenant's objections to proposed order for restitution and motion for oral argument on the propriety of a restitution order).
	46	Filed memorandum in support of motion (MOT#16) (Defendant's objections to proposed order for restitution and motion for oral argument on the propriety of a restitution order).
12/22/86	47	Filed answer to motion (MOT#16) (Defendant's objections to proposed order for restitution).
01/15/87	48	Filed reply to answer to motion (MOT#16) (Defendant's objections to proposed order of restitution).
04/01/87	49	- Government's supplemental response to defendant's objections to proposed restitution order.
	50	- Defendant's reply to government's supplemental response to defendant's objections to proposed restitution order.

04/02/87		Sentencing of defendant (Count SS4) (EIGHT (8) YEARS pursuant to Title 18, United States Code, Section 4205(a)).
		Dismissed on government's motion (Counts 1-2,S1-S5,SS1-SS3,SS5-SS6).
		Motion mooted (MOT#16) (Defendant's objections to proposed order for restitution and motion for oral argument on the propriety of a restitution order).
04/06/87	51	Issued Judgment and commitment to U.S. Marshal (Count SS4).
07/31/87	54	Motion to reduce sentence filed (MOT#17) (Count SS4).
	55	Filed memorandum in support of motion to reduce sentence (MOT#17).
08/06/87	56	Filed answer to motion to reduce sentence (MOT#17).
10/07/87		Motion to reduce sentence denied (MOT#17).
	57	Order filed (ORDER that the defendant's motion to reduce sentence and to correct an illegal sentence be; and it hereby is, DENIED).
10/19/87	58	Filed notice of appeal (Count SS4) (APPL#1) (of the order denying motion to reduce sentence and to correct illegal sentence entered on October 7, 1987).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	) CRIMINAL NO.) SA-86-CR-162
Plaintiff,	) *SECOND*
V.	) *SUPERSEDING*
FRASIEL L. HUGHEY,	) *INDICTMENT*
Defendant.	) [Vio: 18 U.S.C.) § 1709: Theft of Mail) By Postal Employee;) 18 U.S.C. § 1029(a)(2):) Credit Card Fraud]) (Filed Sept. 17, 1986)

THE GRAND JURY CHARGES:

COUNT ONE
[18 U.S.C. § 1709]

On or about October 31, 1985, in the Western District of Texas, Defendant,

FRASIEL L. HUGHEY,

being an employee of the United States Postal Service, did embezzle a letter which had been entrusted to him, and which had come into his possession intended to be conveyed by mail, the said letter being addressed to James R. Windom, 16903 Nicole, Houston, Texas, in violation of Title 18, United States Code, Section 1709.

COUNT TWO
[18 U.S.C. § 1029(a)(2)]

That between on or about December 27, 1985 and on or about January 6, 1986, in the Western District of Texas, and elsewhere, Defendant,

FRASIEL L. HUGHEY,

did knowingly and with intent to defraud use an unauthorized access device, to-wit: Mastercard Credit Card Number 5417-1160-0052-6095, issued to James R. Windom, 16903 Nicole, Houston, Texas, and by such conduct did obtain things of value aggregating more than $1,000, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

COUNT THREE
[18 U.S.C. § 1709]

On or about May 21, 1986, in the Western District of Texas, Defendant,

FRASIEL. L. HUGHEY,

being an employee of the United States Postal Service, did embezzle a letter which had been entrusted to him, and which had come into his possession intended to be conveyed by mail, the said letter being addressed to T. C. Morton, 8500 Nairon, #308, Houston, Texas 77074, in violation of Title 18, United States Code, Section 1709.

COUNT FOUR
[18 U.S.C. § 1029(a)(2)]

That on or about October 18, 1985, in the Western District of Texas, and elsewhere, Defendant,

FRASIEL L. HUGHEY,

did knowingly and with intent to defraud use an unauthorized access device, to-wit: MBank Mastercard Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Crosby, Texas 77532, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

COUNT FIVE
[18 U.S.C. § 1709]

On or about September 1, 1985, in the Western District of Texas, Defendant,

FRASIEL L. HUGHEY,

being an employee of the United States Postal Service, did embezzle a letter which had been entrusted to him, and which had come into his possession intended to be conveyed by mail, the said letter being addressed to Bob Saunders, 846 Oak Bluff, Lancaster, Texas, in violation of Title 18, United States Code, Section 1709.

COUNT SIX
[18 U.S.C. § 1029(a)(2)]

That on or about October 31, 1985, in San Antonio, in the Western District of Texas, and elsewhere, Defendant,

FRASIEL L. HUGHEY,

together with CLARENCE E. THOMPSON, named herein as a principal, but not as a co-defendant, did knowingly and with intent to defraud use unauthorized access

devices to wit: MBank Mastercard, Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Crosby, Texas 77532, and MBank Mastercard, Credit Card Number 5245-0064-1911-5440, issued to Bob Saunders, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commmerce (sic), in violation of Title 18, United States Code, Section 1029(a)(2).

/s/ EP Fulton
FOREMAN

HELEN MILBURN EVERSBERG
United States Attorney

By: /s/ Daniel E. Maeso
DANIEL E. MAESO
Assistant United States Attorney

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF TEXAS
October 20, 1986

LUCIEN B. CAMPBELL
FEDERAL PUBLIC DEFENDER

Honorable H. F. Garcia
United States District Judge
Western District of Texas
John H. Wood, Jr. U.S. Courthouse
655 East Durango Boulevard
San Antonio, Texas 78206

Re: *U.S.A. v. Frasiel L. Hughey*
Cause No. SA-86-CR-162

Dear Judge Garcia:

This is to advise the Court that the parties have arrived at the following plea agreement:

1) The Defendant will plead guilty to count four of the second superseding indictment charging him with Credit Card Fraud, in violation of 18 U.S.C. § 1029(a)(2).

2) The government will, at the time of sentencing and with leave of the court, dismiss the remaining counts of the second superseding indictment as well as the two previous indictments.

3) The government agrees not to prosecute the Defendant for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment.

This constitutes the agreement in its entirety.

Respectfully submitted,

/s/ Lucien B. Campbell
Lucien B. Campbell
Federal Public Defender

LBC:ip
cc: Daniel E. Maeso, Assistant
United States Attorney
Frasiel L. Hughey

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Transcript of Proceedings of
October 27, 1986) (p. 10)

* * *

[10] THE COURT: Is there a question of restitution in this case, Mr. Maeso?

MR. MAESO: I believe the law would apply, Your Honor.

THE COURT: All right. Mr. Hughey, do you understand also that in addition to any term of imprisonment or fine imposed by the Court for the offense to which you are pleading guilty, you may be required to make restitution in the form of money for any property loss suffered by the victim as a result of this offense. Do you understand that?

MR. HUGHEY: Yes, Your Honor.

* * *

[11] THE COURT: All right. Mr. Maeso, what in summary would be the Government's evidence as to the charge to which this Defendant has pled guilty?

MR. MAESO: Yes, Your Honor. If the case went to trial, the Government would show that prior to October 18, 1985, [12] MBank mailed to Mr. Hershey Godfrey at 504 Cypress, Crosby – Cypress Street in Crosby, Texas, MasterCard number 5417-1260-0013-9427, that written on the outside of the envelope was a notation, as it is written on all MBank credit cards, that it was not to be returned –

that it was not to be forwarded to the Defendant's address – to the recipient's address if not received by him.

The Government would show that at the time the card was mailed, this Defendant was employed by the United States Postal Service in the downtown post office here in charge of rifling, that is, pulling these cards that were undelivered from the mainstream of the mail and to deposit them in a particular box number 2426 of the San Antonio Post Office.

The Government would show that Mr. Hughey, in that position, took the undelivered card in the envelope of Mr. Hershey Godfrey, as well as a number of other cards adding more than fifteen in number.

However, with respect to count four of the indictment, the Government would show that Mr. Godfrey, in the company of co-Defendant Thompson – in the presence of co-Defendant Thompson, went to the Windsor Park Mall here and charged and obtained from the Dillards Department Store at Windsor Park Mall, a stereo or equipment in the amount of $1,055.19, that he charged that stereo component to Mr. Hershey Godfrey's credit card that is listed in count four of the indictment, that by [13] such he obtained goods in excess of $1000.

The Government would further show that the offense did affect interstate commerce. That is the factual basis, Your Honor.

THE COURT: Thank you.

MR. CAMPBELL: May I speak to that first, Your Honor?

THE COURT: Go ahead.

MR. CAMPBELL: We are not acknowledging or responding to any facts or accusations outside of count four. Mr. Maeso made some allegations as to some unspecified other cards, but we are not making admissions to anything other than the facts pertaining to count four.

THE COURT: All right. Now that the charge in the indictment and the factual basis have been read to you, Mr. Hughey, I need to ask you again if you understand the nature of the charges against you, sir?

MR. HUGHEY: Yes, Your Honor.

THE COURT: And do you understand that before you can be found guilty of credit card fraud, the Government has to prove those facts just read to you beyond a reasonable doubt?

MR. HUGHEY: Yes, Your Honor.

THE COURT: Do you have any questions concerning the charge or the factual basis?

MR. HUGHEY: No, Your Honor.

THE COURT: Do you agree, then, with the Prosecutor's [14] summary of what you did in this matter as concerned to count number four of the indictment?

MR. HUGHEY: Yes, Your Honor.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption omitted in printing)

(Filed December 9, 1986)

DEFENDANT'S OBJECTIONS TO PROPOSED ORDER FOR RESTITUTION AND MOTION FOR ORAL ARGUMENT ON THE PROPRIETY OF A RESTITUTION ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files his Objections to Proposed Order for Restitution and Motion for Oral Argument on the Propriety of a Restitution Order, and would show the Court as follows.

I

On December 4, 1986, Defendant's counsel was informed both orally (by telephone) and in writing of a proposed restitution order in this case in the amount of $147,646.89. Pursuant to the May 24, 1985 order of the judges of this division, Defendant hereby timely files his objections to the proposed order of restitution, on the following grounds:

1) Court records reflect that a related defendant, Clarence Thompson, has already been ordered to make restitution of this same amount of $147,646.89, for the same purpose. While the order was made "jointly and severally" among related defendant's, they are not

named, nor is there any apportionment of the amount of restitution. It is certainly not the intention of the Victim and Witness Protection Act to provide a windfall to crime victims, by multiplying restitution orders of the same amount.

2) The Defendant Hughey is financially unable to make the proposed restitution. Defendant would have to pay almost $30,000 per year for five years to satisfy such an order in full. In order to pay $30,000 per year in restitution, Mr. Hughey's earnings would have to be significantly in excess of that figure, in order to allow for payment of taxes and living expenses. Defendant has no expectation of future earnings as would enable him to make the restitution contemplated.

3) The notice from the Probation Office (a copy of which is attached) does not afford Defendant adequate notice of the basis of the proposed restitution order. Even augmented by the additional details in the Presentence Investigation Report, which was received by Defendant's counsel on December 5, the notice does not meet the requirements of due process. Defendant does not agree to this amount, and requires proof by the government of the basis of any restitution order beyond the $1055.19 transaction which he admitted at arraignment.

4) The proposed restitution amount is excessive and unauthorized because it exceeds the losses of any victims of the offense of which the Defendant was convicted. The count on which the Defendant was convicted refers to a credit card belonging to one Hershey Godfrey, whereas the proposed restitution includes many other credit

cards. Such an order of restitution is not sanctioned by any pertinent authority.

5) The notice from the Probation Office, augmented by the presentence report, does not report whether the victims have received or are to receive other compensation. The Court is required to consider this factor prior to deciding upon a restitution order.

II

Motion for Oral Argument

In view of the objections raised herein, Defendant requests the opportunity to present oral argument at the time of sentencing on the propriety of a restitution order.

WHEREFORE premises considered, Defendant prays this Honorable Court will hear oral argument on these objections, and thereafter decline to order restitution.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption omitted in printing)

(Filed December 9, 1986)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTIONS TO PROPOSED ORDER FOR RESTITUTION AND MOTION FOR ORAL ARGUMENT ON THE PROPRIETY OF A RESTITUTION ORDER

MAY IT PLEASE THE COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Memorandum of Law in Support of Defendant's Objections to Proposed Order for Restitution and Motion for Oral Argument on the Propriety of a Restitution Order and would show the Court as follows:

I

The issue of restitution in this case is governed by 18 U.S.C. § 3651 if it be imposed as a condition of probation, and otherwise by the Victim and Witness Protection Act of 1982 (VWPA), codified presently as 18 U.S.C. §§ 3579-80. The procedure for imposing restitution under the VWPA in this division is set out in this Court's Order of May 24, 1985.

II

Full Restitution Has Already Been Ordered

In Cause No. SA-86-CR-163, United States v. Clarence Eugene Thompson on the docket of this Court, that defendant has already been ordered to pay the full amount of restitution in this case. While this assessment was made "jointly and severally" with other related defendants, there was no apportionment among defendants. It is not clear how much of the total Mr. Thompson was to pay.

The Act provides, with an exception not pertinent here, that "The court shall not impose restitution with respect to a loss for which the victim has received *or is to receive* compensation . . . ." This mandatory prohibition would cover the case at bar, since it was not the intent of Congress to provide windfall multiple compensation to victims of crime.

III

The Defendant's Indigency

The procedural section of the VWPA, 18 U.S.C. § 3580, requires the Court to consider, among other things, " . . . the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents . . . ." *Id.*, subsec.(a). All the information available to the Court is to the effect the Defendant is indigent, and has no earning ability such as would enable him to make the proposed restitution or any significant part of it. Whether the Defendant is ordered to make restitution as a condition of probation or under the VWPA, he would have a maximum of five

years to do so.[1] Mr. Hughey is a young man (24 years old) who does not have the qualifications or experience to obtain the high paying job necessary to make restitution in this case. Furthermore, in seeking employment Mr. Hughey will be laboring under the disability of his criminal record.

It would be a vain thing to order a person of Defendant's means to make restitution as proposed. While a restitution order under the VWPA must be made a condition of probation or parole, any revocation proceedings for non-payment must consider the defendant's ability or inability to pay. 18 U.S.C. § 3579(g). *See also Bearden v. Georgia*, 461 U.S. 660, 667-68, 103 S.Ct. 2064, 2070, 76 L.Ed.2d 221 (1983) ("[I]f the State determines . . . restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.")

A restitution order as proposed carries little prospect of success, but a significant danger of wasting the time and resources of the Court, counsel, the Probation Office, or the Parole Commission.

---

[1] Title 18 U.S.C. § 3651 provides in part: "The period of probation, together with any extension thereof, shall not exceed five years." The VWPA provides that if the Court requires a person to make restitution within a specified period, the end of such period shall not be later than "five years after the end of the term of imprisonment imposed, if the court does not order probation . . . ." 18 U.S.C. § 3579(f)(2)(B).

IV

The Proposed Restitution is Excessive and Unauthorized

The amount proposed in the notice from the Probation office ($147,646.89) exceeds the Court's restitution authority in this case. The VWPA provides in pertinent part that "The court, when sentencing a defendant *convicted of an offense* . . . may order, in addition to or in lieu of any other penalty provided by law, that the defendant make restitution to any victim *of the offense*." 18 U.S.C. § 3579(a)(1). The offense of which the Defendant was convicted was credit card fraud with a certain credit card issued to one Hershey Godfrey. Restitution is accordingly limited to that offense. *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1968) ("The amount of restitution under 18 U.S.C. § 3579(b)(1) (1982) or 18 U.S.C § 3651 (1982 & Supp. III 1986) may not exceed the actual losses flowing from the offense for which the defendant has been convicted.") To the same effect is *United States v. Durham*, 755 F.2d 511, 512 (6th Cir. 1985) ("A natural construction of this language [§3579(a)-(1)] would require that the defendant make restitution only to victims of the offense for which he was convicted.")

V

Basis for Restitution Not Established

The Defendant has not admitted to any amount other than the $1055.19 transaction which was the basis for Count Four which he pled to. The Defendant objects to the amount shown in the letter notice from the Probation Office, and to the amounts shown in the presentence

report. What has been shown to the Court is no more than a list of credit card holders, a list of three card-issuing financial institutions, with a total loss for each. The government is required to demonstrate the amount of the loss sustained by a victim of the offense by the preponderance of the evidence. 18 U.S.C. § 3580.

Counsel believes the amount noticed by the Probation Officer is the sum of a very large number of transactions attributed to the Defendant by the investigative agency. They extend over a long period of time and wide geographic area, including multiple judicial districts. Restitution should be ordered to the extent "the imposition of such order will not unduly complicate or prolong the sentencing process." 18 U.S.C. § 3579(d). Not only would it be illegal to order restitution beyond the count of conviction (See part IV above), but to attempt to do so would grossly complicate and prolong the sentencing process.

VI

Other Compensation

Under the statutory scheme, the "court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation . . . ." 18 U.S.C. § 3579(e)(1). Also, the Court is required to consider the "amount of the loss sustained by any victim . . . ." 18 U.S.C. § 3580(a). If the victim financial institutions were to receive compensation from insurance or cardholder deductibles on loss, this would affect the mount of restitution. *See United States v. Durham*, 755 F.2d 511, 514-15 (6th Cir. 1985).

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL
ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption omitted in printing)

(Filed December 22, 1986)

GOVERNMENT'S RESPONSE TO "DEFENDANT'S OBJECTIONS TO PROPOSED ORDER FOR RESTITUTION"

(INCORPORATING BRIEF WITH AUTHORITIES)

To THE HONORABLE JUDGE OF SAID COURT:

The United States, through its undersigned counsel, hereby request that this Court overrule the defendant's objections and assess against this defendant joint and several liability for the complete amount of restitution due in this cause. In support of its position, the United States would show the Court as follows:

I.
FACTS

As the evidence would show, this defendant was employed by the downtown post office from June 25, 1985 unitil (sic) December 20, 1985. While there, the defendant developed a scheme by which he would steal credit cards which were returned to the post office undelivered. By this scheme, he pilfered some 30 credit cards, used them or caused them to be used, with intent to defraud and caused a financial loss to the banks in excess of $147,646.89.

II.
JOINT AND SEVERAL LIABILITY

As the defense correctly relates, related defendant Clarence Thompson has been ordered to make restitution for the full amount $147,64€.89, "jointly and severally" with his cohorts in crime. The defendant notes that the Court has not apportioned liability among the jointly and severally liability defendants. This Court is not required to make any such apportionment. *United States v. Tzakis*, 736 F.2d 867, 871 (2nd Cir. 1984). *Tzakis*, makes clear that co-defendants may be properly held jointly and severally liable for restitution for the full amount of a loss cause by their criminal conduct, as long as the crime victims do not in fact recover more than their actual lossess (sic). *Id.* This Court need not, nor should it be called upon, to predict how much each jointly and severlly (sic) liable defendant will be able to pay as restitution in coming years. This Court has already seen fit to hold a related defendant jointly and severlly (sic) liable for the full amount with related defendants, and the defendant now before the Court should be treated no differently. The defendant should be required by this Court to make his best efforts to make his crime victims whole.

III.
THE DEFENDANT'S INDIGENCY

The Court is not prohibited from imposing restitution on a defendant who is indigent at the time of sentencing. *United States v. Ruffen*, 780 F.2d 1493,1494-95 (9th Cir. 1986). It remains to be seen whether the defendant, using his best efforts, will be able to obtain all or a substantial part of the total restitution due within the span of several

years. Again, a related defendant has been called upon to make such an effort, and this similarly situated defendant should not receive special treatment.

IV.
BASES FOR AMOUNT OF RESTITUTION

The United States is prepared to demonstrate by preponderance of the evidence, that the victims of the defendant's criminal conduct sustained a loss of $147,646.89. *See* 18 U.S.C. § 3580. We do not anticipate that our evidence would "grossly complicate and prolong the sentencing process."

To begin with, restitution is appropriate for injury suffered as a result of actions that surround commission of the defendant's criminal offense, regardless of whether those actions are elements of the offense charged. *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985). As the plea agreement in this case reflects, the defendant had engaged in a credit card fraud "scheme.", assists the government's evidence establishes that the defendant participated in a scheme to defraud through the use of credit cards, restitution is not limited to amounts directly attributable to the particular count which was the subject of the defendant's guilty plea [check cites closely and elaborate, Also, Dan check on insurance and cardholders deductibles, as alleged in "VI" of the defendant's submission, so that you can explicitly counter that in your response.] In view of the forgoing, the United States urges this Court, after hearing oral argument, to order the defendant to pay restitution in the amount of $147,646.89 for which he should be jointly and severlly (sic) liable with his crime partners.

Respectfully submitted,

HELEN MILBURN EVERSBERG
United States Attorney

By: /s/ Payne F. Speck
DANIEL E. MAESO
Assistant United States

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption omitted in printing)

DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE TO DEFENDANT'S OBJECTIONS TO PROPOSED ORDER OF RESTITUTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Reply to the Government's Response to Defendant's Objections to Proposed Order of Restitution and would show this Honorable Court as follows.

I

In paragraph IV of its response, the government cites *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985) in support of its position that Defendant is liable for a restitution order pertaining to many different credit cards, even though he has only been convicted of an offense involving one credit card. The *Durham* case, however, illustrates the precise point of law raised by Defendant in his objections.

In determining what restitution may be ordered to "any victim of the offense", 18 U.S.C. § 3579(a)(1), there are two terms which must be defined. The first question is what is the offense, and the second is who are victims of that offense. While the courts have defined the second term expansively, the first term has been narrowly restricted to the offense of conviction.

The *Durham* case was a prosecution fro bank robbery, and the evidence showed the defendant destroyed a vehicle by arson "during the course of the robbery." 755 F.2d at 512. The court held the insurer of the automobile was a victim of the robbery, for restitution purposes, because the destruction of the automobile occurred as a result of, and during the course of the robbery. First, however, the court determined that the term "offense" means only the offense of conviction.

In the instant case, the government suspects a number of illegal credit card transactions on a number of different credit cards. Those other cardholders, or their banks, are victims of other offenses, not the offense of conviction, which has to do only with the Hershey Godfrey credit card.

II

The government further urges, without citation of authority, that because the government contends there was a credit card fraud "scheme", Defendant is liable for restitution beyond the count of conviction. The government may be thinking of cases in which the count of conviction is a conspiracy encompassing an entire scheme, or it is an offense which has as an essential element a scheme to defraud, such as mail fraud. The instant prosecution is not such a case. The Defendant stands convicted of one count of fraudulent use of a specified unauthorized access device, namely, the credit card of Hershey Godfrey, in violation of 18 U.S.C. § 1029(a)(2). While the statute permits prosecution for such use during a one-year period, the government chose

to allege only the single transaction of October 18, 1985, which evidence showed amounted to $1055.

III

Because there was no conviction for any scheme, or even a conspiracy involving a scheme, restitution is limited to the offense of conviction, the unauthorized use of the Hershey Godfrey credit card on October 18, 1985. In view of Defendant's indigency, this is an appropriate limitation of restitution.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Transcript of Proceedings of March 27, 1987) (pp. 4-30)

* * *

[4] THE COURT: 86-CR-162, United States of America, versus Frasiel L. Hughey.

MR. HARDY: Michael Hardy, for the United States, Your Honor. And we are ready to proceed with sentencing.

MR. CAMPBELL: Lucien Campbell for Mr. Hughey, Your Honor, and he is present and we are ready to proceed.

THE COURT: All right. Go ahead, Mr. Campbell. What do we have here.

MR. CAMPBELL: Well, sir, we have sentencing. We have received a pre-sentence report and we'll speak to that. We also have an issue of restitution to be resolved. The probation office sent us a letter at an earlier date and I filed objections to the proposed restitution. The Government filed a response, and I filed a reply to that. And, also, in connection with that, the Government is going to offer a stipulation of the expected testimony that the parties have entered into that will bear on restitution. And will also bear on the total amount involved in these transactions and present a different figure than the one in the pre-sentence report.

THE COURT: Well, I have – somebody handed to me stipulations – is that agreed upon then?

MR. CAMPBELL: Yes, Your Honor. Mr. Hardy is going to offer that, and we have no objection to it. I should make it clear that that is not a stipulation of fact. It is a stipulation as to expected testimony. The law places the burden [5] on the Government to show by a preponderance of the evidence the proper basis for restitution. And they have prepared a stipulation as to what they expect their witnesses to say, and we have no objection to the admission of that stipulation. But as we speak, therein, it is not a stipulation of fact and Mr. Hughey is not making any admission of any fact contained therein for reasons which I will explain.

There is a plea agreement in this case in this district. It involves this indictment and some previous indictments. But the Government through their representative and case agent and through prior attorneys representing the Government, it represented to Mr. Hughey that he may be subject to prosecution in other districts and other jurisdictions. So, on my advice, Mr. Hughey is not making any statement or admission as to any facts outside the offense of conviction in the event of a conviction in this case.

THE COURT: Well, are we going to have to have a hearing or what?

MR. CAMPBELL: Well, we are having a hearing, Your Honor, I don't think it's going to be necessary to call a lot of witnesses because we have stipulated to the testimony that the Government wishes to offer. There are some issues to be resolved on the question of restitution

and I – I would certainly like the opportunity to speak to those. Does the Court want to pick up the restitution matter first or the [6] pre-sentence report or –

THE COURT: I think we will because if I have to read something or take it under advisement, I just can't –

MR. CAMPBELL: Very well, Your Honor.

MR. HARDY: Well, Your Honor, the Government would offer the stipulation which has been marked as Government Exhibit 1 in evidence. It is offered in lieu of live testimony and various witnesses that the Government would call. And this is a time saving effort.

THE COURT: Now, this is – what – the stipulation that you are now offering is what the Government would show the Court as true?

MR. HARDY: That's correct, Your Honor.

THE COURT: All right. What do you have to say to that, Mr. Campbell?

MR. CAMPBELL: All right, Your Honor. First, I will address this with the written memorandum that I submitted in the earlier stages of this sentencing. But I believe there's an important legal issue on the scope of restitution under the – Victim and Witness Protection Act codified as 3579 and 3580. Under 3579 – 3579 and 80, the first subsection says that when a person is convicted of an offense, the Court may order restitution to any victim of the offense. Now, there are two questions there. What is the offense and who is a victim of the offense. And in my examination of these issues, I find that the [7] court defines the term victim very liberally. In other words, the question of who may be a victim of the offense is given a

pretty expansive reading for a definition. But the question of what is the offense, is the offense of conviction.

Now, there are cases and I believe that some of them are before the Court, where restitution has been found proper outside of the offense of conviction. And I understand those cases, and I believe they are properly decided. But I think the Court will find in every instance it is a situation where the offense of conviction necessarily takes in matters and amounts beyond what is alleged in that count of the indictment. For example, the number of cases where the offense of conviction is a conspiracy. The defendant is convicted of conspiracy. So the conspiracy included the whole plan or the whole scheme. And, therefore, restitution of the whole amount involved was held to be proper.

There are other cases that are under the mail fraud or wire fraud statutes which the Court is aware involves an element of the offense. That there was a scheme or artifice to defraud, so a person who is found guilty of mail fraud or wire fraud has been found guilty, number one of having devised and engaged in a scheme to defraud. And in those cases the courts have said that restitution for the amounts involved in the whole scheme, not just that particular wire transmission, are proper. And I certainly understand those cases. But, by contrast, the [8] conviction – the conviction in this case Count 4 of the last superseding indictment was for one violation of Title 18, Section 1029, credit card fraud. It alleges use of one particular credit card which was issued to Hershey Godfrey on one particular day, October the 18th, 1985. And the matters that the Government has presented by way of their stipulated testimony, relate to other offenses on

other credit cards. That is other uses at other times and places. That, in fact, some of them in other judicial districts were not even prosecutable before this Court. The Government chose to prosecute under Title 18, Section 1029 and I think the offense of conviction is simply different from a conspiracy that takes in a whole plan or a mail fraud that takes in the whole plan. And I think that restitution is not legally proper beyond Hershey Godfrey credit card.

Now, in the written filings that I made, I urge that it be limited to that transaction of the indictments which was a little bit over a thousand dollars. I certainly can see an argument that restitution might be proper under the act for every use of that particular credit card that is even outside of that indictment, but limited to that credit card which was the basis of conviction. And the amount involving that credit card was $10,412.00. And I would recommend that amount to the Court as being the proper amount of restitution for a number of reasons. One, I believe it is within the law. And I believe [9] the other credit cards are not within the law.

I see other points that I would like to mention, Your Honor. The stipulation presents three types of proof to the Court. Paragraph 1-A says the Defendant, Mr. Thompson – Mr. Jones would testify that Clarence Thompson, who is another defendant that the Court sentenced last December, would say that Mr. Hughey gave Thompson these 15 cards listed here. Now, I understand the theory whereby Mr. Hughey is ultimately responsible – assuming this is proper restitution – the cards that he gave Thompson, but the facts are different on the next page. Item number two says that a postal inspector would

testify that a business person identified the Defendant as the individual who had used a James R. Windom card. Well, I believe that this is significantly different. In other words, the Defendant using it would pay a business person on one occasion, I don't believe is a proper basis for holding him liable for the entire amount that may have been used on that card.

And in the same matter, down in Paragraph 4-B with the level quoted there is that the business persons identified to the Defendant in possession of two credit cards. And, there again, I think that is different. It does not rise to the same level as the Government presenting evidence that the Defendant provided the cards to someone else to use which would arguably make him responsible for all the use on them.

And then the other matter that concerns me, Your Honor, is [10] that a lot of these usages, and I cannot tell the Court how many of – or what part it is, but I know from the discovery that has been provided me here that certainly some of these cards, the Chapman and Wharton cards down in Paragraph 4-B, the Government believes that they were used in some other judicial district outside of the Western District of Texas. That use would not be prosecutable here. Under their position, it may be prosecuted in some other district at some future date and would then be subject to a restitution order upon conviction of some other district. So, there again, I don't think it's proper to even consider restitution outside this district even if the Court should look beyond the Hershey Godfrey credit card, the one that is the basis of conviction.

Another matter, Your Honor, is that the Court is required to consider the financial condition of the Defendant under Title 18, Section 35-A, Subsection A in determining whether to order restitution and the amount, if restitution is ordered, the Court shall consider it. The Court is required to consider the financial resources of the Defendant and the financial means and earning ability of the Defendant.

In this connection, Your Honor, we would stand on the pre-sentence report information as to employment earnings history and present financial condition. I don't think there is any dispute as to these matters, and I would ask the Court to accept that information as our showing as to Mr. Hughey's [11] financial condition. It relates on Page 9 and 10 of the pre-sentence report that looking back over the last six years from about age 19, I would say, to age 25 when Mr. Hughey entered the work force where he worked as a cook for $6.50 an hour, worked as a laborer in '83 and '84. In '85, worked as a department store – in a department store earning $4.00 an hour. His employment at the post office from the latter part of 1985 was at $5.00 an hour. He operated a business during half of 1986 – a video business, and earned about $3,000.00, to be an annual rate of $6,000.00 if it had lasted that long which is even lower earnings than those hourly wages. The report also reflects on the next page that his only asset is a vehicle worth about $1,200.00 against which he has liabilities of $8,100.00. Other debts with his own – on his own credit cards. So, Mr. Hughey is already in the hole. He has never earned any substantial sum of money. When he is released from incarceration, he hopes to complete his education, but whether he is going to

school or commencing work right away, his earnings are not going to be at a high level. And this simply puts a practical limit on the amount of restitution that Mr. Hughey can order. The probation officer mentioned on Page 11 of the report that the probability of making full restitution is unlikely in view of the asset that Mr. Hughey has and I think – seem to think that is accurately quoted, and the Court is required to consider these things, and I think that what they [12] tell the Court is that some smaller amount of restitution is proper. We are not saying that there should be no restitution. There certainly should. But I think the Court should approach it in a practical way and assess a sum that the Defendant can and will pay. The sum that is reasonable and require him to pay because the limit of the time that the Court can give him under this law is five years from the expiration of his term of imprisonment. And I think the sum of $10,412.00, which is the total amount on the Hershey Godfrey card, is legally correct under the law. That it is in keeping with the financial resources of the Defendant and his expected future earnings and and the amount that he could repay and would and should properly be required to repay as a condition of parole and is a – is a debt that's enforceable.

There is one other matter involved here on the question of restitution which I would like to address and that is the fact that another defendant related to this case was sentenced by this Court back on December 8th. That is Clarence Eugene Thompson under cause number SA-86-CR-163. And looking at the judgment, I see that the Court ordered restitution in the amount of $147,646.89 which was the gross amount suspected. Now, having examined

the basis for this, I suspect that that amount is excessive. But I certainly don't think that the mere fact that an excessive amount was ordered and another defendant is reason to continue to order an excessive amount in this case and [13] I know that the Court would not approach it that way. There is not only Mr. Hughey to be sentenced in this case, but I will tell the Court that there is another defendant named Thomas Baetty (sic) who has been arrested who is also involved in these matters and will probably come before this Court and if he is found guilty for entry of a restitution order.

So, I believe that all three need to be fair, and I'm certainly interested in Mr. Hughey's being fair and reasonable. And if the Court should believe that the amount ordered in Mr. Thompson's case last December is not correct, I believe the Court has the full power an authority to adjust it under Rule 35 either with or without a motion. And I found a case that supports that view, United States versus House, a 7th Circuit case reported at 808 Fifth Circuit 508 where the 7th Circuit reviewed the propriety of the amount of restitution on a Rule 35 motion. So, if the Court should order a lesser amount in the case of Mr. Hughey which is reasonable, the Court would have full power to make any adjustment in the interest of justice in the case of Mr. Thompson.

THE COURT: All right, sir. Mr. Hardy?

MR. HARDY: Yes, Your Honor. First of all, the Government would like to formally offer Government's Exhibit Number 1 which is the stipulated testimony that the Government witnesses would provide.

(Government's Exhibit Number 1 offered into evidence.)

[14] MR. CAMPBELL: We have no objections, Your Honor.

THE COURT: All right. It will be received into evidence.

(Government's Exhibit Number 1 received into evidence.)

MR. HARDY: Your Honor, by way of response to Mr. Campbell's observations, we would first urge that the stipulation is more than sufficient under the preponderance of the evidence standard to establish the Defendant's restitutionary obligations as a result of his criminal conduct in this case. We would refer the Court to United States vs. Hill which is a 10th Circuit 1986 case, a copy of which has been provided the Court in advance and as well to Mr. Campbell. The rationale articulated in Hill rejects the approach you have just heard. And the holding of the Court in Hill is that the amount of restitution in a particular case under the Victim and Witness Protection Act need not more – shouldn't be limited to the particular count of conviction. The Court has taken some pains to distinguish between the Victim and Witness Protection Act and the Federal Probation Act. The Federal Probation Act the Court in hill indicates – provides by express language that loss is limited to the offense for which – for which conviction was had. But no similar limiting language appears in the Victim and Witness Protection Act. The Court also notes the discussion of the legislative history with respect to the Victim and Witness Protection Act and the tenor of the legislative history is that [15] the – every possible effort within the – is supposed to be undertaken to make the victims of crime whole. And the

Federal Government is suppose to take all reasonable efforts to make sure that crime victims are placed in a – at least to bring greatest extent possible, in a position of well-being that they enjoyed prior to the criminal conduct by the Defendant.

Mr. Campbell indicated that the Government is limited to the one particular count of the multi-count indictment to which the Defendant pleaded guilty and Hill's response to that argument is as following: "We believe limiting a victim's recovery to the amount charged in the indictment or to particular counts of the offense is unwarranted given the compensatory objectives of the V.W.P.A. The decision of the prosecutor for indicating a Defendant and the manner in which a Defendant is indicted have little if anything to do with the objectives of the V.W.P.A. For instance, a prosecutor's decision to charge the Defendant for one more count in an offense is discretionary. And that discretion is exercised taking into consideration law enforcement objectives which have nothing to do with the Congressionally objectives of compensating crime victims."

The Court goes on to further indicated (sic) that "any amount that might be specified in an indictment count should not be binding in any way on the Court in determining how much resti – in determining how much restitution to order." Because such statements in the indictment are often included to satisfy [16] jurisdiction requirements.

The Government would note to the Court another fundamental difference between the Federal Probation Act which appears to be at the heart of the cases which

the defense has cited in its response to the proposed restitution order and the Victim and Witness Protection Act. That is under the Federal Probation Act, restitution cannot be ordered if incarceration is ordered on a particular count. On the other hand, under the Victim and Witness Protection Act, the remedy of restitution operates in tandem with any other remedy that may be at the Court's disposal.

We hope that it's clear then, that the purposes and the language of the Victim and Witness Protection Act differs from the more restrictive approach taken by the Federal Probation Act. And the Court in Hill notes that Congress must have been aware when it enacted the the (sic) Victim and Witness Protection Act of the limitations that were present in the Federal Probation Act. And the V.W.P.A. does not mirror the language of the Federal Probation Act.

Mr. Campbell alluded to a series of cases in which the courts have allowed restitution to exceed specific counts in the indictment on which the Defendant was convicted when there is a scheme to defraud or in a conspiracy type of case. My research has indicated that most of these cases have been decided under the Federal Probation Act. We would urge to the Court that a [17] scheme to defraud has been alleged and shown in this case, Your Honor. First of all, the plea letter submitted – drafted and submitted by the defendants in this case recognizes that the indictment does charge a scheme. The particular counts of the multi-count indictment refer to embezzlement of credit cards and unauthorized use of credit cards. And the indictment makes clear that we are talking about

more than one credit card. The allegations in the indictment are on or about. So there is no limitation to any one particular time or any one individual transaction.

Further, there are counts of the indictment which refer to the fact that over $1,000.00 in unauthorized charges were run up. So clearly, Your Honor, the Government is not limiting itself to any particular figure. The proper factual basis for the guilty plea as to this particular Defendant, Mr. Maeso, who was representing the Government at that time indicated that this Defendant was responsible for embezzling over 15 credit cards betraying his position of trust at the post offices where he worked. Therefore, the Defendant was again placed on notice that his restitutionary responsibility could certainly exceed any one particular count that might be specified in the indictment.

The Defendant has given further notice as a result of statements made in a pre-sentence report and even further notice as result of representations made in this stipulation testimony [18] to which the Defendant has now agreed is admissible and properly considered by this Court.

We believe, therefore, Your Honor, that as result of the indictment itself, as a result of the proffered factual basis for the guilty plea in this case, as result of the pre-sentence report, and as a result of the evidence that is specified in the stipulation that the Defendant has been placed on ample notice of his restitutionary responsibility here and that that restitutionary responsibility is no way confined to any one particular indictment here.

We will further echo, Your Honor, that just as in the Federal Probation Act cases that refer to scheme and to fraud that the multi-count indictment that was facing this particular Defendant should be regarded more as with – each count being viewed as one overt act in furtherance of a scheme to defraud. Again, certain indictment counts mentioned the Defendant's intent to defraud through his unauthorized use of access devises, namely credit cards in this case.

The defense made reference to – seemed to indicated (sic) that there may be a difficulty as to the Government showing causation. The Defendant's causation of a particular lawsuit, specifically referring to Government evidence that would relate to the Defendant's use of a particular credit card. The – Mr. Campbell properly indicated that the cases take a very expansive role as to defining what victim of an offense is and what that [19] term mean.

And also, these cases take a very broad view of what causation means in the restitution context. By virtue of the Defendant's intervention, his stealing these credit cards, his having these credit cards in his possession, he was responsible for running up unauthorized bills on these cards. Even if he was not the one who did it – the charging, he had no business having these cards in his possession and the stipulation makes clear that time and time again this particular Defendant stole the credit cards from the post office where he works. We see no difficulty as to causation. And we see no difficulty either, Your Honor, as to victim. We are seeking restitution as to only one victim, MBank U.S.A. Whose credit cards were pilfered and were used in an unauthorized fashion.

THE COURT: In what amount, sir?

MR. HARDY: We have agreed to a compromised figured of $90,431.00.

We further note, Your Honor, that concern of double recovery should be dispelled. The V.W.P.A. makes clear that no victim of restitution can be compensated twice for a particular loss. So we see as a illusory any difficult (sic) concerning the victim's double recovery in this case. And it is conjectural, indeed, whether the Defendant will, in fact, be charged for related misconduct in any other jurisdiction.

THE COURT: Well, I mean if in the pre-sentence report, [20] the figure I have here is that the restitution is – total of restitution is $147,646.89. The stipulated – stipulations do not back that up, do they?

MR. HARDY: We have agreed to a lesser amount, Your Honor.

THE COURT: On the front of the case that you gave me, it says that the Court must determine – the Court must determine – there must be a factual determination by the Court, right? From the preponderance of the evidence?

MR. HARDY: Yes, Your Honor. And preponderance of the evidence that we have presented backs-up fully the $90,000.00 figure that we have offered here.

I would note further, Your Honor, that the Government is endeavoring to be entirely reasonable. We do recognize that the Defendant is of limited means and the $90,000.00 figure mentioned in the stipulation is very

substantial restitution and would certainly indicate the Government's interest.

We would further note, Your Honor, that as to Mr. Campbell's reference to the Defendant's financial condition, that there is no futility in ordering a very sizable restitution amount. That Congress in its wisdom has given a Defendant time after he has served prison to pay back the losses that he has caused, we would urge that the Defendant – that the responsibility for the loss be placed squarely on the Defendant's shoulders where they belong.

[21] That – and there is a case which has an excellent discussion of the relationship of indigency to restitution orders, United States versus Atkinson, 788 Fed Second 900, a 1986 Second Circuit case. That indicates that an indigent should not be en (sic) encouraged to evade his responsibility to make the victims whole through an order of restitution that is neither or nonexistent because that completely eliminates any incentive for the Defendant to make the victim whole in the events that he subsequently comes into resources that would enable him to make that victim whole. We would urge that the Court is not a seeer (sic). That he cannot fortell what the Defendant's precise financial condition will be in a number of years. The Defendant may be successful in a lottery, perhaps he will be able to harness his ingenuity and his efforts in the criminal area and gear those toward legitimate business activity that would yield substantial benefits which in turn could be used to pay the victims in this case.

We would further note, Your Honor, that another Defendant who appeared before you, Clarence Thompson, has been assessed a very sizable restitution amount. And the Defendant before you now is the individual who provided that Defendant with credit cards. And that certainly we would echo the sentiments of the pre-sentence report and inferences to be drawn from the stipulation that this particular Defendant is highly culpable and that a sizeable restitution order is warranted in this case.

[22] THE COURT: All right.

MR. CAMPBELL: May I reply, Your Honor?

THE COURT: Yes, sir.

MR. CAMPBELL: I didn't want to interrupt Mr. Hardy's remarks. He said something to the effect that we have agreed on the figure of $90,000.00. I'm sure it's clear that I'm not agreed that that's the proper amount of restitution for this Court to order. I'm urging the Court to look to the figure of $10,412.00 which is the credit card involved in count of the conviction.

We agree that the $90,000.00 figure is the Government's showing – the Government's evidence as to the total involved and other cards where the Government suspects the Defendant's involved. It is smaller than the figure in the pre-sentence report because we challenged them and we objected to it. I believe that the level of suspicion on someone else filling the role, the level that is proper to be included is the total of his behavior and in exchange for our entering into the stipulation relieving the Government of the obligation of calling witnesses, we

agreed on the smaller figure of $90,000.00 to replace the amount of the pre-sentence report and, in fact, the pre-sentence report should be rewritten to reflect that.

Responding to Mr. Hardy's argument, Your Honor, in the Hill case that he mentioned, I think it's highly significant that he (sic) the offense of conviction and the other things that were brought [23] in restitution were identical. In other words, the theft of Ralgro steroid implants from the same victim. In the offense of conviction and in the restitution outside the conviction. It's the very same thing. Same victim and same theft.

And in this case, there are other offenses which are separate violations involving different credit cards used at different times and places. And I think there is simply a difference. Mr. Hardy has spoken to the probation officers in 3651 in the Victim and Witness Protection Act 3579 and 80. And I certainly know the difference between the two. And contrary to Mr. Hardy's assertions, I believe, on Page 4 of the memorandum of my objections of the cases that we cite, are under the new law United States versus Barnett an 11th Circuit case or sister Circuit published in '86, I believe a conviction that was transposed in this brief of '68, but was reported in 800 Fed Second 1558, "the amount of restitution under 18 U.S.C.3579-B or 3651, but dealing with this law may not exceed the actual losses flowing from the offense for which the defendant has been convicted."

The Durham case, a 6th Circuit case, decided in 1985 after this law, citing this law says "that neutral construction of this language 3579-A1 would require that the

Defendant make restitution only to victims of the offense for which he was convicted."

Mr. Hardy refers to the plea letter which uses language part [24] of the scheme alleged in the indictment. The purpose of this plea letter is to protect the Defendant of his being charged with any other offense that could be related to all of the indictments in this case, the original and the superseding.

Naturally, this language is expansive to carry out the intent of the parties to protect the Defendant. It does not enlarge the indictment. It certainly doesn't add anything to the offense of conviction. If you look at the indictment – indictments as a whole, one may infer some scheme, but the point is the offense of conviction does not carry any scheme as an element of the offense like mail fraud or like conspiracy. And the plea letter cannot change or enlarge or expand upon the offense of conviction.

Mr. Hardy speaks of some several count referring to the course of conduct over a period of time, that's in the statute, however, in the count of conviction, we did not allege it that way. They alleged one particular use of the card on one particular date, October 18, 1985, and did not allege over a period of time and did not allege on or about.

Mr. Hardy refers to the factual basis. I know that we made it very clear at that time, Your Honor, that Mr. Hughey was not admitting to any fact outside of the offense of conviction for the reasons I have repeated here today.

Mr. Hughey says – or rather Mr. Hardy says that the P.S.I. is a basis for this. We promptly filed our objections to the [25] amount in the P.S.I. We timely filed them in accordance with the plan in this Court. Mr. Hardy urges larger restitution because Mr. Hughey may win the lottery or something like that. I don't think the Court should look at speculative things like that. The Court is required to look at the financial resources and prospects that Mr. Hughey and I think they dictate a lower amount more in line of the $10,412.00 which I believe is legal.

Your Honor, Mr. Hughey is not trying to evade his responsibility and he has written a statement to the Court. He referred to restitution. I believe he should be required to make some restitution. I believe it should be an amount that is legal and an amount that is realistically possible for him to make when the authorities can require him to make that under the procedures provided in the law. And I believe the amount that I suggest is proper.

THE COURT: All right.

MR. HARDY: Your Honor, may I briefly reply?

THE COURT: It has taken up too much time already. I tell you what I'm going to do, gentlemen. I'm just not going to be be (sic) able to read all of that. This matter was just handed to me awhile ago, all of these briefs and replies and – let me proceed first on the report itself.

Mr. Hughey, this pre-sentence report was prepared for the Court, have you gone over this, Mr. Hughey?

A Yes, sir.

[26] THE COURT: Have you discussed it with your attorney?

MR. HUGHEY: Yes, Your Honor.

THE COURT: Now, do you know of any corrections to this report that you want the Court to know about, for the record?

MR. CAMPBELL: If I may reply, Your Honor?

THE COURT: Go ahead.

MR. CAMPBELL: First, in keeping with our position throughout our Court appearances on this case, Mr. Hughey does not admit or speak to any facts outside the offense of conviction.

Now, on Pages 3, 4, 5, and 11, that is the prosecution version, the victim impact statement and also the evaluated summary toward the end of the report, there are references to other offenses. Some committed in other districts with other credit cards at other times. We are not approving or accepting or admitting any allegations outside the offense of conviction for the very good reason I've already explained to the Court.

THE COURT: All right, sir.

MR. CAMPBELL: As to the total amount which is set out as $147,000.00 – the $147,000.00 figure –

THE COURT: $147,646 –

MR. CAMPBELL: Uhm –

THE COURT: – it's on Page 5.

MR. CAMPBELL: Page 5. Yes, Your Honor.

THE COURT: All right.

[27] MR. CAMPBELL: We do object to that figure for the reason that that was the total amount of the suspected of what everyone was suspicioned. We took it up with the Government and in the interest of shortening this proceeding before the Court, I asked the Government to pull out those matters that they believe that they have sound evidence to the legal standard as to the preponderance of the evidence and they presented us with that $90,000.00 figure – $90,000.00 and change which was in the stipulation.

So, I would ask the Court to direct that the presentence report be rewritten to reflect the amount that the Government is advancing now in the as to which we are – we are not presenting any evidence to challenge as being the proper amount. It could be important further down the road, Your Honor. The parole commission will look to this report in what they call a total offense behavior and make decisions about parole guidelines and I think it's important that that so called total offense behavior be an accurate report, and the number that we have agreed to put before the Court is the Government's version and that is the $90,000.00 and change figure in the stipulation.

THE COURT: Thank you. Is that right, Mr. Hardy?

MR. HARDY: That is correct.

THE COURT: $90,431.00?

MR. HARDY: Yes.

THE COURT: All right. It will be so corrected. All [28] right, sir.

MR. CAMPBELL: Your Honor, a typo on Page 10, Mr. Hughey is 6'1" and not 6'11".

THE COURT: All right.

MR. CAMPBELL: On the salient factor score, I don't agree with every one of these points. This is the probation officers parole guidelines worksheet which is next to the last on my copy. It might be the third from the last in the Court's copy. Item E under salient factor score is an item that requires the person making the assessment to look and see if the Defendant was on probation at the time of the current offense. That score is zero meaning on probation. Your Honor, the date of the offense in this case is October the 18th, 1985, not on or about, but precisely October the 18th, 1985.

The pre-sentence report reflects Mr. Hughey was not placed on probation in state Court until March 27th, 1986, several month (sic) after the offense of conviction. So, I believe, Item E should be scored as one point instead of zero for a total score of seven instead of six.

THE COURT: In other words, that the offense committed was committed – was not –

MR. CAMPBELL: Yes, Your Honor, before – several months before he was placed on probation.

THE COURT: All right. Do you have any objection to that?

[29] MR. HARDY: May I have one moment, Your Honor?

THE COURT: Yes.

MR. CAMPBELL: Your Honor, Mr. Hardy has pointed out to me that there have been about three indictments in this case, the last one a second superseding does say on or about October the 18th and I've been referring to it as precisely October the 18th, but, the fact – the allegation is on or about October the 18th.

Nevertheless, I would submit that there is not any evidence before the Court that it was committed on any other date than October 18th, '85 from the discovery that was made available to me was that it happened exactly on that day. So, I don't believe there is any question that the offense was committed before Mr. Hughey was placed on probation.

MR. HARDY: No objections, Your Honor.

THE COURT: Okay. So it will be one – In other words, the total score will be seven instead of –

MR. CAMPBELL: Yes, Your Honor, that's – that's the way I see it.

THE COURT: Okay. Anything else?

MR. CAMPBELL: No Your Honor.

THE COURT: All right. All of these presentations to the Court will necessitate me preparing a whole new structure of the sentence that I have. And before I do that – I mean – I'll hear allocution on your part and his part at that time.

[30] MR. CAMPBELL: Very well.

THE COURT: We're hard pressed here – Mrs. – Judy.

(Off the record discussion between the Court and the Court Clerk.)

THE COURT: Mr. Campbell and Mr. Hardy and Mr. Hughey, I will reset that for sometime during the week, hopefully I'll just reset the trial that I'm going and proceed from the sentencing. And I will hear allocution from you and from the Government at that time. Okay?

MR. CAMPBELL: I'll be available, Your Honor.

THE COURT: All right. Fine. Thank You.

(Case adjourned.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)

STIPULATION

TO THE HONORABLE JUDGE OF SAID COURT:

In connection with the determination of the Defendant's responsibility for restitution under the Victim and Witness Protection Act in this cause, the Defendant and the United States agree to the admissibility of testimony set forth below that would have been offered by witnesses for the government:

1. Special Agent Scott C. Jones of the United States Secret Service in San Antonio, Texas, would testify that Clarence Eugene Thompson related that:

Government Exhibit 1

(a) The Defendant gave Thompson VISA or Mastercharge cards issued by MBank USA to the following persons:

1. Jack C. Bradberry
2. Allen Brown
3. Romalie Calder
4. Ernest and Elizabeth Cuevas
5. Hershey Godfrey (to which Defendant pleaded guilty)
6. Carole and Anthony Harrison
7. Ronald W. Kramer
8, 9. Monte Magruder
10. L.C. Miller
11. Wil W. Nefkins (to which Thompson pleaded guilty in Case No. SA-86-CR-163)
12. Mike Ribordy
13. Francis R. Spaulding
14. Tommy Y. Watson, and
15. Larry Willman.

(b) The Defendant admitted getting these credit cards from the San Antonio post office where he worked. When MBank mail containing the cards could not be delivered because the addressees had moved, the mail would be routed to MBank's post office box where the Defendant intercepted it.

2. Postal Inspector Greg M. Castillo of San Antonio, Texas, would testify that a business person identified the Defendant as the individual who had used an MBank Mastercharge Card issued to James R. Windom.

3. Postal Supervisor Charles W. Menear, Jr., of San Antonio, Texas, would testify that the Defendant worked at the downtown San Antonio postal station from June 1985 through December 1985 and that the Defendant had access in connection with his postal duties to P.O. Box 2426 assigned to MBank USA.

4. Special Agent Joseph L. LaBranche, investigator for MBank USA at Houston, Texas, would testify that:

(a) Thomas Edward Beatty, Jr. (charged with credit card fraud in Case No. SA-86-CR-84), related that the Defendant provided Beatty with the following VISA or Mastercharge Cards issued by MBank USA to the following persons:

1, 2. Richard Blaydes, and
3. Keith L. Little.

(b) Business persons identified the Defendant in possession of the following VISA or Mastercharge Cards issued by MBank USA to the following individuals:

1. Robert L. Chapman, and
2. T. C. Morton.

(c) All the above-listed legitimate and assigned cardholders at various times between June and December 1985 reported that they had moved, had not received their VISA and Mastercharge Cards, and had been billed for charges they did not authorize.

(d) Envelopes on mail from MBank USA addressed to the above-named legitimate and assigned cardholders and enclosing credit cards were marked, "Do Not Forward – Return to Sender," P.O. Box 2426, in San Antonio, Texas 78298.

(e) Unauthorized charges on the above-mentioned credit cards, knowledge of which the legitimate and assigned cardholders disavow, represent actual total dollar losses to MBank USA as follows:

Legitimate Card Customer	Total Loss (Dollars)
1, 2. Richard Blaydes	5,482
	6,056
3. Jack Bradberry	4,908
4. Allen Brown	2,289
5. Romalie Calder	4,045
6. Robert Chapman	1,021
7. Ernest, Elizabeth Cuevas	2,351
8. Hershey Godfrey	10,412
9. Carole, Anthony Harrison	1,809
10. Ronald Kramer	4,074
11. Keith Little	1,409
12, 13. Monte Magruder	471
	1,453
14. L.C. Miller	2,894
15. T. C. Morton	3,793
16. Wil Nefkins	7,488
17. Mike Ribordy	5,236
18. Francis Spaulding	5,053
19. Tommy Watson	9,473
20. Larry Willman	4,049
21. James Windom	6,665
TOTAL:	90,431

The above testimony is offered to satisfy a preponderance of the evidence standard, not one of beyond a reasonable doubt. This is a stipulation as to expected testimony only, not a stipulation of fact. It does not constitute any admission by the Defendant of any fact contained herein.

I agree with the foregoing:

/s/ Lucien B. Campbell — 3-27-87
LUCIEN B. CAMPBELL — Date
Federal Public Defender
Attorney for Defendant

/s/ Frasiel L. Hughey — 3-27-87
FRASIEL L. HUGHEY — Date
Defendant

/s/ Michael R. Hardy — 3-26-87
MICHAEL R. HARDY — Date
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Filed April 18, 1987)

GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S OBJECTIONS TQ PROPOSED RESTITUTION ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

The United States, through its undersigned counsel, hereby files this supplemental response to the Defendant's objections to the proposed order of restitution and would show this Court as follows:

I.

Restitution Not Limited to Count of Conviction

The Defendant has steadfastly maintained that this Court lacks jurisdiction to order restitution for criminal transactions extending beyond the confines of the sole count to which he pleaded guilty, Count Four of the Second Superseding Indictment. He urges that his restitutionary responsibility is, therefore, limited to that count's reference to the Defendant's October 18, 1985, unauthorized use of the Hershey Godfrey credit card ($1,055). We disagree.

United States v. Hill, 798 F.2d 402 (10th Cir. 1986), rejected a like argument. *Hill* upheld the district court's authority under the Victim and Witness Protection Act (VWPA) to order restitution ($148,330) which exceeded

losses arising directly out of the offenses charged in the indictment ($20,000). *Id.* at 404, 406. Said the Court: "We hold that in determining the amount of loss to a victim for purposes of awarding *restitution under the VWPA*, a district court *is not limited* either *by* the amount specified in the indictment or *the specific transactions alleged in the indictment*. *Id.* at 406 (emphasis added).

Hill was convicted on two counts of transporting stolen goods in interstate commerce. *Id.* at 403. But, due to evidence adduced at trial, he was held accountable in restitution for theft of the same type of goods from the same victim occurring prior to the criminal transactions charged in the indictment. *Id.* at 406. By the same token, stipulated testimony admitted into evidence at Defendant Hughey's sentencing proceeding establishes restitution responsibility beyond the one MBank-issued credit card he admitted embezzling from the post office, during his rearraignment on Count Four. This evidence shows that Hughey stole the same type of item, twenty other credit cards; in the same manner, embezzlement from the post office; to the detriment of the same victim, MBank USA. Attachment 1. Hughey's restitutionary obligation under the VWPA extends to all of these embezzlements.

Hill distinguishes the language concerning restitution in the VWPA (18 U.S.C. §§ 3579-80) from that in the Federal Probation Act (FPA, 18 U.S.C. § 3651). The FPA permits restitution for aggrieved parties for "loss caused by the *offense for which conviction was had.*" *Id.* at 405 (emphasis in original). Courts have narrowly construed this phrase. *United States v. Missouri Valley Construction Co.*, 741 F.2d 1542, 1547 (8th Cir. 1984) (en banc). On the other hand, the VWPA does not contain such limiting

language; it allows court-ordered restitution "to any victim of the *offense*." *Hill*, 798 F.2d at 405 (emphasis in original). The court noted that "[n]owhere in the VWPA did Congress limit victim compensation to the indictment, even though it must have been aware of such a limitation given the [FPA] by certain courts." *Id.* & n.4.

The VWPA offers the sentencing court a broadened ability to order restitution over that authorized by the FPA. *United States v. Ferrera*, 746 F.2d 908, 909 (1st Cir. 1984); *United States v. Satterfield*, 743 F.2d 827, 833-34 (11th Cir. 1984). Under the FPA, restitution and incarceration may not be imposed on the same count. Under the VWPA, however, restitution may be ordered in tandem with any other authorized penalty as part of a defendant's sentence. *United States v. Hawthorne*, 806 F.2d 493, 495 n.2 (3d Cir. 1986). Moreover, the VWPA specifically provides that '[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the *preponderance* of the evidence.' *Hill*, 798 F.2d at 405 (emphasis in original).

Hill also noted the purpose of the VWPA as reflected by its legislative history. Congress intended " 'to restore the victim to his or her prior state of well-being' to the highest degree possible," and to insure that the federal government "does all that is possible within limits of the available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." *Id.*

Hill's observations on the policies underlying the VWPA are particularly illuminating:

> [W]e believe limiting a victim's recovery to the amount charged in the indictment or to particular counts of the offense is unwarranted given the compensatory objectives of the VWPA. The decision of a prosecutor to indict a defendant and the manner in which a defendant is indicted have little, if any, to do with objectives of the VWPA. For instance, a prosecutor's decision to charge a defendant for one or more counts of an offense is discretionary, and that discretion is exercised taking into consideration law enforcement objectives which have nothing to do with the congressional objective of compensating crime victims. The decision to specify an amount in the indictment is also often solely for the purpose of satisfying jurisdictional requirements.

Id.

Authorities cited by the defense, *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986) (per curiam), and *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985), do not persuade. They matter-of-factly lump restitution orders under the VWPA with their more restrictive counterparts under the FPA. Unlike *Hill*, they fail to consider meaningful distinctions between the two. *Barnette* reaches its conclusion concerning the VWPA by referring without explanation to one FPA case. 800 F.2d at 1571. *Durham* offers a conclusion without citation of authority or analysis. 755 F.2d at 512.

Hill's restitution rationale is applicable not only in cases where proof of loss is presented at a trial. It likewise applies to pleas of guilty on one on [sic] more counts of a multicount indictment when the remaining counts are dismissed. *United States v. Mischler*, 787 F.2d. 240, 245 (7th Cir. 1986).

Even under the more restrictive FPA, several appellate courts have not strictly limited restitution orders to the count or counts of conviction. Each count in a multi-count fraud or conspiracy case has been regarded as one act in furtherance of a unitary scheme, so that restitution may be ordered for losses caused by the entire scheme or conspiracy. *Id.* at 245 (ongoing scheme to defraud); *United States v. Sleight*, 808 F.2d 1012, 1018-19 (3d Cir. 1987); *Hawthorne*, 806 F.2d at 496-97; *United States v. Martin*, 788 F.2d 184, 188 (3d Cir. 1986); *United States v. Woods*, 757 F.2d 82, 88 (3d Cir. 1985); *United States v. Pivirotto*, 775 F.2d 82, 87-88 (3d Cir. 1985); *United States v. Harris*, 761 F.2d 394, 404 (7th Cir. 1985); *United States v. McMichael*, 699 F.2d 193, 195 (4th Cir. 1983); *United States v. Tzakis*, 736 F.2d 867, 871 (2d Cir. 1984).

Hill, it must be remembered, allowed restitution under the VWPA beyond the confines of the indictment, which charged neither a conspiracy nor a scheme. Nevertheless, a fraudulent scheme was adequately alleged and shown in the instant case. The plea agreement letter of October 20, 1986, submitted by defense counsel recognizes that the Second Superseding Indictment alleged the Defendant's involvement in a singular scheme ("the scheme alleged in the Indictment"). Attachment 2. The six-count Second Superseding Indictment facing the Defendant referred to the Defendant's embezzlement of credit cards from the mail (Counts 1-2, 5-6). It also mentioned the Defendant's unauthorized use of credit cards with intent to defraud (Counts 2, 4, 6). Attachment 3. Thus, as the Defendant recognized, the indictment charged him with a scheme involving the embezzlement and unauthorized use of credit cards.

The indictment counts contain "on or about" allegations. Also, Count Four, to which the Defendant pleaded guilty, refers to the Defendant's obtaining "more than $1,000" as a result of this fraudulent conduct. Consequently, the indictment's language did not convey that restitutionary obligations would be limited to a criminal transaction occuring on a particular date, or that the victim's loss was limited to a particular dollar amount.

The Defendant has been given further notice of the government's intention to hold him responsible for losses attributable to his embezzlement of numerous MBank credit cards from the mail, credit cards in addition to those mentioned in the indictment. The government's proffered factual basis for the Defendant's guilty plea at rearraignment alluded to the Defendant's embezzlement of over 15 credit cards.

More important, the evidence offered in support of the restitution order in connection with this sentencing proceeding establishes by a preponderance of the evidence the Defendant's involvement in a scheme to defraud MBank USA. The evidence shows that the Defendant embezzled at least 21 separate MBank-issued credit cards by betraying his position of trust with the post office where he worked. The government's proof further shows that the Defendant's fraudulent scheme resulted in a loss to MBank of at least $90,431. Whether under the logic of *Hill* and the VWPA or the reasoning of the FPA scheme cases, the Defendant may be held accountable in restitution for all the losses the Defendant caused MBank USA as a result of his credit card embezzlements.

II.

Restitution Unaffected by Possible Intervening Acts of Others

Defendant Hughey has suggested that he should not be held accountable for unauthorized charges billed by others after he stole the credit cards. The government need not prove that Hughey was *directly* responsible for all the losses claimed. Because Hughey's embezzlement created the circumstances under which MBank's harm occurred, he bears restitutionary responsibility for subsequent acts caused by others with regard to the credit cards he stole or unlawfully possessed. *See United States v. Spinney*, 795 F.2d 1410, 1417 (9th Cir. 1986) (citing cases). Stipulated testimony shows that Hughey embezzled from the post office where he worked 21 MBank-issued credit card (sic).

III.

Current Indigency No Bar to Restitution Order

Every federal court considering the issue has ruled that indigency at the time of sentencing, though a factor to be considered, does not bar restitution under the VWPA or FPA. *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986) (citing cases); *United States v. Roberts*, 783 F.2d 767, 771 (9th Cir. 1985) (bankrupt defendant).

United States v. Atkinson, 788 F.2d 900, 904 (2d Cir. 1986), upheld the district court's power to assess sizeable restitution demands on an indigent. The court made the following observations, which apply with equal force here:

> District judges are not seers and cannot accurately predict a defendant's economic future . . . .In fact, "[r]ecognizing that indigency may be temporary, Congress provided for payment of restitution during a period of up to five years after the completion of any prison sentence imposed.". . . .
>
> Since many defendants who are sentenced to terms of incarcertaion (sic) do not have the funds to make restitution immediately, restitution orders would be severely limited if district judges did not have discretion to discount the importance of present indigency in performing the statutory balance. Although there may be little chance that it will ever be made, if full restitution is not ordered at the time of sentencing, an indigent would evade the statutory purpose of making the victim whole in the event he should subsequently come into sufficient funds.

Id.

Holding Defendant Hughey responsible for the sizeable losses attributable to his criminal conduct furthers the VWPA's objectives. Restitution should restore the victim as far as possible to the position he would have enjoyed if the defendant's criminal acts had never occurred. *Kelly v. Robinson*, ___ U.S. ___, 107 S.Ct. 353, 360-61 n.10, 93 L.Ed.2d 216 (1986). Rather than an afterthought, restitution should inevitably insure that the wrongdoer makes good, to the degree possible, the harm he caused the victim. *Atkinson*, 788 F.2d at 903.

The government's evidence shows that the Defendant caused MBank losses in excess of $90,000. He may still possess ill-gotten gains. A substantial restitution order places the financial burder (sic) where it belongs, on the malefactor – not on the victim or society. It may

also encourage a return of fraudulently obtained property.

Furthermore, this Court has already imposed a properly substantial restitution order on related defendant Clarence Thompson. Thompson was less culpable than Hughey, who supplied the stolen credit cards. So that the punishment will fit the crime and the offender, a similarly hefty restitutionary obligation should be imposed on Defendant Hughey. *See United States v. Anglian*, 784 F.2d 765, 768 (6th Cir. 1986). The Defendant should be put to his best efforts to make his victim whole.

IV.

Restitution Amount Established

By offering the Court stipulated testimony, the government has established a compromised restitution figure of $90,431 to protect against undue complication or prolongation of the sentencing process. Aside from the Defendant's rearraignment, of which this Court may take judicial notice, no other evidence was offered. The government's figure is, therefore, satisfied by a preponderance of the evidence. MBank has represented that the $90,431 is not affected by cardholder deductibles, and the victim is not expected to receive insurance compensation covering any part of the loss. By relying on the figure set forth in the stipulation, this Court will reach an expeditious, reasonable determination and would resolve uncertainties with a view toward achieving fairness to the victim. *United States v. Richard*, 738 F.2d 1120, 1123 (10th Cir. 1984).

In view of the foregoing, the Defendant should be ordered to pay restitution to MBank USA in the amount of $90,431, an obligation he should share jointly and severally with related defendants.

Respectfully submitted,

HELEN MILBURN EVERSBERG
United States Attorney

By: /s/ Michael R. Hardy
MICHAEL R. HARDY
Assistant United
State Attorney

[Certificate of Service omitted in printing.] [Attachment 1 (Government's Exhibit 1, "Stipulation"); Attachment 2 (plea agreement letter filed October 22, 1986); and Attachment 3 (Second Superseding Indictment) are omitted in printing as they are already included in this Joint Appendix.]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)

DEFENDANT'S REPLY TO GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S OBJECTIONS TO PROPOSED RESTITUTION ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Defendant's Reply to Government's Supplemental Response to Defendant's Objections to Proposed Restitution Order and would show the Court as follows:

I

The Government Mischaracterizes the Defendant's Position

In paragraph I of its Supplemental Response, the government asserts the Defendant's position to be that restitution may not exceed the $1055 amount of the October 18, 1985 transaction of which the Defendant stands convicted. The government attempts to set up this false position only to knock it over, thereby to argue for restitution in the highest amount of $90,431. At the hearing on the matter of restitution, however, defense counsel *suggested* a restitution order beyond the transaction of conviction, totaling $10,412, the sum of all unauthorized uses of the Hershey Godfrey credit card which was named in the count of conviction. For Defendant's view to prevail, the Court need not hold that restitution may never exceed

the count of conviction – there is ample authority that under proper circumstances, it may. The Court, however, is obliged to examine the facts and circumstances to determine just how far beyond the count of conviction, if at all, restitution may extend in a particular case.

The Defendant's authorities make it clear that the Court may order restitution to any victim of the offense of conviction. The offense of which the Defendant was convicted was credit card fraud with a certain credit card issued to one Hershey Godfrey. Restitution is accordingly limited to that offense. *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986) ("The amount of restitution under 18 U.S.C. § 3579(b)(1) (1982) or 18 U.S.C. § 3651 (1982 & Supp. III 1986) may not exceed the actual losses flowing from the offense for which the defendant has been convicted.") To the same effect is *United States v. Durham*, 755 F.2d 511, 512 (6th Cir. 1985) ("A natural construction of this language [§ 3579(a)(1)] would require that the defendant make restitution only to victims of the offense for which he was convicted.")

The government relies upon *United States v. Hill*, 798 F.2d 402 (10th Cir. 1986). Defendant submits the proposed restitution of $10,412 is consistent with that authority. In Hill, the defendant was convicted of two counts of interstate transportation of "Ralgro" steroid implant stolen from the Crown warehouse. The court ordered restitution which included other uncharged thefts by the defendant of the same "Ralgro" from the same complainant, Crown. Restitution was thus ordered to extend to takings which were more of the same, compared to the counts of conviction. Analogizing to the case at bar, *Hill* would support a restitution order encompassing all of the takings which

were the same as alleged in the count of conviction, namely, use of the Hershey Godfrey credit card. It is an unwarranted extension of *Hill* to say it supports restitution for unauthorized use of *other* credit cards, as other times and places, including other federal judicial districts. Defendant's authorities, *Barnette* and *Durham*, would not permit such an extension.

II

Offense of Conviction Did Not Include a Scheme

During the hearing on restitution, defendant's counsel observed that a common circumstance supporting restitution beyond the offense of conviction is where the offense includes as an element a scheme which encompasses other takings. Examples given were mail fraud, which requires the existence of a scheme to defraud, or a conspiracy which was alleged to include a scheme to defraud. Government counsel now seeks to argue there was a scheme in this case which supports restitution in the amount of $90,431.

The reference to a scheme in the plea agreement letter can hardly be said to have amended the indictment, or enlarged the offense of conviction. The purpose of the plea letter was to establish all the things the Defendant would *not* be convicted of. Finally, even if one might infer the existence of a scheme from the allegations of the indictment taken as a whole, Defendant was not convicted of the indictment as a whole. Defendant was convicted of one count of unauthorized credit card use, 18 U.S.C. § 1029(c), which does not require any scheme, and no scheme was alleged. Restitution under the Victim and

Witness Protection Act is based upon the offense of conviction, not the imagination of the prosecutor. The government's arguments that Defendant had notice the government would seek greater restitution do not provide a legal basis for ordering that restitution. Defendant properly and timely followed the prescribed procedures of this Court for objecting to the proposed order of restitution.

III

The Level of Proof

Assuming *arguendo* that restitution for other credit cards may be ordered, which Defendant does not concede, the government's proof is inadequate to support the total sought, $90,431. In paragraph II of its Supplemental Response, the government asserts the evidence shows the Defendant embezzled all 21 credit cards making up the $90,431 loss. According to the compound hearsay of the stipulated testimony, however, the government's evidence that Defendant embezzled credit cards from the post office went only to the 15 cards named by Clarence Thompson. Stipulation, pp 1-2. Beatty said the Defendant provided him with 3 other credit cards. *Id.*, p. 3. As to the remaining credit cards, the government's showing did not establish an argument for overall responsibility for the entire amount. In paragraph 2 of the stipulation, a hearsay showing is made that "a business person" identified the Defendant as a person who had used a James R. Windom credit card. This is not sufficient to support an order of restitution for all unauthorized uses of that credit card. Paragraph 4(b) of the stipulation presents

hearsay from unnamed business persons that the Defendant was *"in possession of"* two certain credit cards. There was no showing of the Defendant's responsibility for unauthorized use of those credit cards. This too is insufficient. It must be remembered that the government bears the burden of establishing the losses attributable to the Defendant, by a preponderance of the evidence. 18 U.S.C. § 3580(d).

IV

The Defendant's Financial Resources and Earning Ability

Title 18, U.S.C. § 3580(a) states (emphasis added):

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, *shall consider* the amount of the loss sustained by any victim as a result of the offense, *the financial resources of the defendant, the financial needs and earning ability of the defendant* and the defendant's dependents, and such other factors as the court deems appropriate.

It is thus mandatory for the Court to consider the Defendant's financial resources and earning ability. Defendant accepts the statement of his earnings history and financial condition in the presentence report, and asks the court to consider it in determining restitution. During the hearing, government counsel argued the Court should impose $90,431 restitution because, *e.g.*, the Defendant might win the lottery. This is contrary to Congressional intent. The statute does not say to disregard the defendant's financial resources because he may strike it rich someday, it says the Court *"shall consider"* the

financial resources and earning ability. A proper consideration of those factors suggests that restitution in the amount proposed by Defendant's counsel, $10,412, is proper.

In its written submission, the government relies heavily upon *United States v. Atkinson*, 788 F.2d 900 (2d Cir. 1986). In *Atkinson*, the trial judge ordered restitution of the fullest amount of $29,813.76 for conviction of three bank robberies. (All of which was based upon the counts of conviction, it should be noted.) The result in *Atkinson* was that the case was remanded to the district judge with instructions to weigh the § 3580(a) factors in deciding restitution because the judge had eschewed consideration of a compromise figure of $10,000 or $15,000. The teaching of *Atkinson* is that it is not proper to leave the weighing of ability to pay to parole officials at a later date, as the government urges. The Defendant is entitled to have those factors properly weighed not only later, if constitutionally required, but now, as statutorily required. *Atkinson* rejects the suggestion that the balancing may be deferred until the time of enforcement.

Other language in *Atkinson* is highly instructive: "[C]ongress did not intend that restitution would compensate the victim's loss in every case", 788 F.2d at 903; "Under this scheme it would unquestionably be proper at sentencing for a district judge, in considering a defendant's present and likely future situations, to order restitution of a lesser amount than that which the victim actually lost"; *Id.*; "A district judge must consider all the factors listed in section 3580(a) at the time of sentencing, and may in his discretion reach a compromise figure based on that consideration." *Id.* at 904.

The government also argues that the Court should impose $90,431 restitution on Defendant because the Court has already imposed a "properly substantial" restitution order on related defendant Clarence Thompson. The government neglects to mention the amount, $147,646.89, which now appears excessive. It is a commonplace that two wrongs (or even three wrongs[1]) do not make a right. This Court will seek to do justice in this case, not withstanding the fact that an injustice may have been done in a related case.[2]

Conclusion

The government seeks a restitution order in an amount, $90,431, which is beyond both the statutory authority for restitution and the Defendant's ability to pay. Defendant's counsel proposes a compromise order of $10,412 which has a sound legal basis and which, happily, appears to be proper considering Defendant's financial resources and earning prospects. The Court is required to consider these factors, and may not defer that process for the time of enforcement on the theory the Defendant may win the lottery[3] in the meantime. Counsel respectfully

---

[1] A third related defendant, Thomas Beatty, will likely be before this Court for consideration of a restitution order.)

[2] In any event, this Court retains authority through April 2, 1987 to reduce the amount of restitution in the Clarence Thompson case, SA-86-CR-163, by means of an order under Rule 35, F.R.Crim.P. *See United States v. Atkinson*, 788 F.2d at 901; *United States v. House*, 808 F.2d 508, 509 (7th Cir. 1986).

[3] First, Texas does not have a lottery. Second, even if the legislature should create one, the Defendant would be better

(Continued on following page)

urges the Court to enter the compromise restitution order of $10,412 which is both realistic and just under all circumstances.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

(Continued from previous page)

advised to pay on his debts than to play it. Third, it has been observed that one has a statistically better chance of being struck by lightning than of winning a lottery.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)
(Transcript of Proceedings of April 2, 1987) (p. 20)

THE COURT:

* * *

And, based on a preponderance of the evidence, the Court orders that in accordance with the Victim and Witness Protection Act of 1982 and its amendments to Title 18, United States Code, Section 3579, the Defendant will make restitution to MBank USA in the amount of $90,431. The restitution must be paid in full within five years after the end of the term of imprisonment.

* * *

United States District Court for
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
DOCKET NO. SA-86-CR-162

FRASIEL LIONEL HUGHEY
325 Bethune
San Antonio, Texas, 78208

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date (month) April (day) 2, (year) 1987

[X] **WITH COUNSEL** Mr. Lucien B. Campbell

[X] **GUILTY**, and the court being satisfied that there is a factual basis for the plea, at re-arraignment on 10-27-86;

There being a finding/verdict of [ ] **NOT GUILTY.** Defendant is discharged

[ ] **GUILTY.**

Defendant has been convicted as charged of the offense(s) of credit card fraud on or about October 18, 1985, in violation of Title 18, United States Code, Section 1029(a)(2), as charged in count four of the second superseding indictment filed September 17, 1986.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General

or his authorized representative for imprisonment for a period of eight (8) years pursuant to Title 18, United States Code, Section 4205(a).

Based on a preponderance of the evidence, the Court **ORDERS** that in accordance with the Victim and Witness Protection Act of 1982 and its amendments to Title 18, United States Code, Section 3579, the defendant make restitution to MBank USA in the amount of $90,431.00 to be paid within five (5) years after the end of the term of imprisonment. The restitution ordered herein is assessed jointly and severally with all other defendants related in this offense.

It is **FURTHER ORDERED** that the defendant shall immediately pay to the Attorney General a penalty assessment in the amount of $50.00 for the purpose of funding a federal crime victims fund, pursuant to the "Victims of Crime Act of 1984", 18 U.S.C., Section 3013.

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

On motion of the U. S. Attorney, pursuant to the plea agreement, the remaining counts of the superseding indictment filed 9/17/86, the superseding indictment filed 8/6/86, and the original indictment filed 7/2/86 is hereby dismissed as to this defendant.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ HF Garcia
H. F. GARCIA
U.S. District Judge

Date April 6, 1987

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
(Caption omitted in printing)

MOTION TO REDUCE SENTENCE AND TO CORRECT ILLEGAL SENTENCE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Frasiel L. Hughey, by and through his undersigned attorney and files this Motion to Reduce Sentence and to Correct Illegal Sentence and would show this Honorable Court as follows.

I

Motion to Reduce Sentence

On April 2, 1987, this Court sentenced Defendant on one count of credit card fraud to eight years' imprisonment under 18 U.S.C. § 4205(a), a mandatory special assessment of $50, and restitution of $90,431 (assessed jointly and severally with related defendants). As a renewed plea for leniency, for reasons set out in the accompanying memorandum, Defendant respectfully requests the Court to reduce the sentence previously imposed. Federal sentencing alternatives afford a number of ways in which the sentence may be reduced, while still providing appropriate punishment. Imposition of a split sentence under 18 U.S.C. § 3651 would permit the Defendant to commence working to pay restitution sooner, and a probationary condition of community service could be imposed as well. Early parole eligibility under 18 U.S.C. § 4205(b)(2) or (1) could possibly be of benefit to the

Defendant, since his present sentence requires him to serve a minimum of thirty-two months. Further, the Court may reduce the amount of restitution as a matter of discretion, in consideration of Defendant's lack of financial resources and earning ability.

II

Motion to Correct Illegal Sentence as to Restitution

The restitution amount of $90,431 included losses attributed to a number of credit cards, not limited to the credit card named in the count of conviction. The statute of conviction, credit card fraud under 18 U.S.C. § 1029(a)(2), does not include a scheme or conspiracy encompassing all the credit cards for which restitution was ordered. Since restitution under the Victim and Witness Protection Act is limited to any victim of the offense of conviction, as opposed to victims of offenses not resulting in conviction, the restitution order is excessive and must be reduced.

WHEREFORE, premises considered, Defendant prays this Honorable Court will discretionarily reduce the sentence in this case, and also reduce the restitution order to an amount in keeping with applicable law.

Respectfully submitted,

/s/ Lucien B. Campbell
LUCIEN B. CAMPBELL

ATTORNEY FOR
DEFENDANT

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO TEXAS
(Caption omitted in printing)
(Filed Oct. 7, 1987)
ORDER

On this day came on to be considered the motion of defendant Hughey to reduce sentence and to correct an illegal sentence, and the government's response thereto. Having considered the motion for reduction of sentence, and the responses of the United States Attorney and the United States Probation Office thereto, the Court is of the opinion the motion should be denied. The remainder of this order shall be directed to the propriety of the judgment ordering restitution in the amount of $90,431.00. This issue was briefed by the parties both prior to and after sentencing. Since defendant was not granted probation, 18 U.S.C. Section 3651 does not apply. Authority for the restitution must be found in the Victim and Witness Protection Act, 18 U.S.C. Sections 3579 and 3580.

Section 3579(a)(1) provides that the Court, when sentencing a defendant, may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense. Defendant has contended that restitution must be limited to the offense of which the defendant is convicted. Defendant pled guilty to count 4 of a 5 count superseding indictment charging him with theft of mail by a postal employee and with credit card fraud. Defendant admitted that he knowingly, and with intent to defraud, used an unauthorized access device, to-wit: MBank Mastercard

credit card issued to Hershey Godfrey. Hughey contends that he can only be responsible for the $10,412 of losses attributable to the use of that credit card, since that is the only offense of which he was convicted. *See, United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986). *United States v. Durham*, 755 F.2d 511, 512 (6th Cir. 1985). However, the majority of courts have found, and this Court agrees, that a district judge has the authority to assess restitution in excess of the amount indicated by the count to which the guilty plea was entered. *United States v. Mischler*, 787 F.2d 240, 245 (7th Cir. 1986). *United States v. Anglian*, 784 F.2d 765 (6th Cir. 1986). Given the compensatory objectives of the VWPA, limiting a victim's recovery to the amount charged in the indictment or to a particular count is unwarranted. *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986). *United States v. Kail*, 804 F.2d 441, 449 (8th Cir. 1986).

As regards the restitution issue, the defendant and the United States agreed to the admissibility of testimony that would have been offered by witnesses for the government. That stipulation showed that defendant Hughey gave Clarence Thompson 15 separate credit cards. This stipulation also showed that defendant either used, provided, or was in possession of 6 other credit cards. The total loss in dollars caused to the issuing banks was $90,431. Although defendant Hughey did not himself benefit in that sum, the loss to the issuing banks in that amount was caused by the fact that he used the credit cards or caused them to be used. The Court finds that a preponderance of the evidence supports the award of restitution.

Some courts have justified an award of restitution in excess of the particular counts of the indictment of which the defendant was convicted, by reference to a fraudulent scheme of which the counts of conviction were only part. *See, United States v. Martin*, 788 F.2d 184 (3rd Cir. 1986). *United States v. Paul*, 783 F.2d 84, 88 (7th Cir. 1986). *United States v. Woods*, 775 F.2d 82 (3rd Cir. 1985). Even if the existence of a scheme is a prerequisite to restitution beyond the counts of conviction, the Court finds that this requirement has been satisfied in this case. As a postal employee defendant Hughey developed a scheme by which he stole credit cards which had been returned to the post office undelivered. He stole at least 21 credit cards and either used them himself or caused them to be used to the detriment of the issuing banks. Even the plea agreement signed by defendant's counsel refers to the "scheme alleged in the indictment". The credit card fraud scheme perpetrated by defendant justifies an award of restitution in excess of the amount in the count to which he pled guilty.

Hughey further contends that an award of restitution against him is precluded by the prior award against defendant Clarence Thompson. Section 3579(e)(1) precludes the imposition of restitution with respect to the loss for which the victim has received or is to receive compensation. Though a double recovery by the victim is precluded, awards of joint and several liability are not. The fact that defendant Thompson was ordered to make restitution in the full amount does not assure that the victims' losses will be reimbursed. Until they are, defendant Hughey can be held liable for the losses he has caused.

Hughey finally argues that his indigency should preclude the restitution order. Section 3580 requires that the Court consider the financial resources of the defendant, the financial needs and earning ability of the defendant, and the defendant's dependents in determining whether to order restitution and the amount of such restitution. Though these factors must be considered, the VWPA does not prohibit the imposition of restitution upon a defendant who is indigent at the time of sentencing. *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986). *United States v. Ruffen*, 780 F.2d 1493, 1495 (9th Cir. 1986). Having considered the evidence of defendant's financial status, the Court remains convinced that the restitution award of $90,431 is appropriate.

It is, therefore, ORDERED that defendant's motion to reduce sentence and to correct an illegal sentence be, and it hereby is, DENIED.

SIGNED this 7th day of October, 1987.

/s/ H.F. Garcia
H.F. GARCIA
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Fifth Circuit.

July 27, 1989.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frasiel L. HUGHEY,
Defendant-Appellant.

No. 87-5596.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Frasiel L. Hughey pleaded guilty to one count of illegal credit card use out of a six count indictment, pursuant to a plea bargain. Hughey now appeals the denial of his Fed.R.Crim.P. 35 motion to correct his sentence on the ground that it was error for the trial court to order him to pay restitution beyond that attributable to the one criminal act of which he pleaded guilty. He claims the amount of restitution assessed exceeds that authorized by the Victim and Witness Protection Act (the "VWPA") for four reasons: 1) It includes the value of losses caused by crimes of which he was not found guilty. 2) While it is true that a defendant need not be convicted of a particular offense for that offense to figure into restitution calculations in scheme or conspiracy convictions, Hughey was convicted of neither. 3) The wrong

standard of proof was applied by the court. 4) The court did not sufficiently consider his indigency in its restitutive assessment. We affirm the trial court's assessment of restitution.

Facts and Prior Proceedings

Hughey was charged in a second superseding indictment with three counts of mail theft (18 U.S.C. § 1709) and three counts of fraudulent use of a credit card (18 U.S.C. § 1029(a)(2)). He pleaded guilty to count IV of the indictment, which alleged that on or about October 18, 1985, he misused a Mastercard issued by MBank to Hershey Godfrey by buying merchandise worth more than $1000.00 with it.

As part of the plea bargain, detailed in a letter to the court by Hughey's attorney, the government agreed to dismiss all the remaining counts of all three indictments and not to prosecute Hughey for "any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." The plea bargain was silent regarding restitution. The government offered as the factual basis for the guilty plea that Hughey was a postal employee, that one of his tasks was to place undelivered MBank credit cards in a specific San Antonio Post Office box, and that he had stolen the undelivered Godfrey credit card "as well as a number of other cards adding to more than 15 in number." Hughey specifically advised the court that he was not acknowledging or responding to any allegations other than count IV (misuse of the Godfrey credit card).

When taking the guilty plea, the court notified Hughey that it could impose restitutive obligations in addition to other penalties. After the plea but before sentencing, Hughey was notified by the United States Probation Office that restitution of $147,646.89 might be sought at the time of sentencing. Hughey objected to this figure, and the government submitted a revised figure of $90,431, which was derived by adding up the losses resulting from unauthorized use of 21 credit cards issued by MBank to 19 individuals, including the Godfrey card.

In a hearing prior to sentencing, the government offered a stipulation of the testimony of witnesses that the government could produce who would testify with regard to Hughey's responsibility for the misuse of the 21 credit cards.[1] The defense made no objection but noted

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[1] As this stipulation formed the basis for the restitutive order (and the current appeal), it is useful to detail what facts the government planned to offer. The stipulations consisted of the following:

1) A Secret Service agent would testify that Clarence Thompson told him that Hughey gave Thompson 15 Visa or Mastercharge cards issued by MBank, and admitted to getting these cards from the post office where he worked.

2) A Postal Inspector would testify that "a business person" identified Hughey as having used an MBank Mastercharge card issued to James Windom.

3) Hughey's Postal Supervisor would testify that Hughey had access to the MBank post office box.

4) An investigator for MBank would testify that:

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that this was a stipulation as to expected testimony, not fact.

In response to the government's proposed figure, Hughey offered to make restitution of $10,412, which he claimed was the sum representing the total loss caused by the unauthorized use of the Godfrey credit card. He argued that he could not be legally held responsible for any greater restitution under the VWPA.

On April 2, 1987, Hughey was sentenced to eight years for violation of 18 U.S.C. § 1029(a)(credit card fraud). Pursuant to the VWPA, 18 U.S.C. §§ 3579 and 3580 (1982) and Supp. IV 1986) (current versions at 18 U.S.C.

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a) Thomas Beatty said Hughey provided him with a total of 3 MBank charge cards.

b) "Business persons identified the defendant in possession" of 2 additional MBank charge cards.

c) All of the listed charge card holders, totaling 19, reported charges they had not made on their cards (totalling 21 – two of the card-holders each has two cards misappropriated), which they had not received in the mail.

d) The cards had all been addressed to people who had moved. The envelopes which held the cards were marked, "Do not forward – Return to sender, P. O. Box 2426, San Antonio, TX. 78298" (the P.O. Box Hughey has access to.)

e) The total losses on the 21 cards from unauthorized charges was $90,431.

§§ 3663 and 3664),[2] he was ordered to make restitution to MBank of $90,431.

Hughey appeals the trial court's denial of his "Motion to Reduce Sentence and to Correct an Illegal Sentence" made under Fed.R.Crim.P. 35. In that motion he challenged the trial court's assessment of restitution as illegal under the VWPA. The trial court stated, when denying Hughey's motion in its order of October 7, 1987:

> The total loss in dollars caused to the issuing banks was $90,431. Although defendant Hughey did not himself benefit in that sum, the loss to the issuing banks in that amount was caused by the fact that he used the credit cards or caused them to be used. The Court finds that a preponderance of the evidence supports the award of restitution.

The court also stated that while it had considered Hughey's indigency, it was convinced that the award was appropriate.

I. Restitution for Acts for Which the Defendant Was Not Convicted.

A. *Standard of Review*

In reviewing the denial of a rule 35 motion, this Court will "examine only whether the sentence was

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[2] 18 U.S.C. § 3579 and § 3580 have since been recodified at 18 U.S.C. §§ 3663 and 3664, respectively. However, the application of the statute as in force at the time of Hughey's sentencing is what is challenged. It is that version of the statute which we must apply. Hence, for the sake of clarity, we will refer throughout this opinion to §§ 3579 and 3580.

illegal or whether the district court abused its discretion." *U.S. v. Kirkland*, 853 F.2d 1243, 1246 (5th Cir. 1988). The legality of a criminal sentence is examined on a *de novo* basis. *See U.S. v. Pomazi*, 851 F.2d 244, 247 (9th Cir. 1988). Because Hughey challenges the legality of his criminal sentence, we review *de novo*.

May a defendant, charged with multiple offenses, who pleads guilty to one offense be required to make restitution under the VWPA for acts of which he was not found guilty? This is the critical issue before us. We find statutory language, history, and case authority all support a trial court's authority to assess restitution under the VWPA in appropriate circumstances for losses beyond those attributable to the offense of conviction.

B. *Statutory Language and History*

Section 3579 of the VWPA refers to "a defendant convicted of an offense" and "any victim of such offense."[3] Section 3580 refers to "the amount of the loss

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[3] The applicable sections of the VWPA were codified at 18 U.S.C. §§ 3579 and 3580. They were then amended twice, so that the relevant portions of § 3579 in force on April 2, 1987 (date of Hughey's sentencing) read as follows:

> § 3579. *Order of restitution*
>
> (a)(1) The court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense. . . .

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sustained by any victim as a result of the offense."[4] The difficulty here is that the term "offense" is not defined independently. Hence the statute is ambiguous, and we must give the term meaning.

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(b) The order may require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(b) if return of the property under subparagraph (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the property is returned) of any part of the property that is returned;. . . .

18 U.S.C. § 3579 (1982 and Supp. IV 1986) Pub.L. 99-646, § 79(a) 1986), amended Subsection (a)(1), changing "the offense" to "such offense."

See 18 U.S.C. §§ 3579 (Supp. IV 1986).

[4] § 3580. *Procedure for issuing order of restitution:*

(a). The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

The reference in § 3579 to "such offense" and the repeated references to "the" property by themselves admittedly point to a maximum restitution determined by the loss attributable only to the offense of conviction and "perhaps for the proposition that the charging instrument establishes the maximum amount of that loss." *United States v. Berrios*, 869 F.2d 25, 28 (2nd Cir. 1989).

Two procedural provisions of the VWPA, however, suggest a more open-ended application of the term "offense" was intended. Section 3580 provides that "the court, in determining . . . the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense," and that it shall consider "such other factors as the court deems appropriate." 18 U.S.C. § 3580(a). It is obvious that the amount of loss may be more than that stated in the charging instrument. Therefore, at the minimum, the VWPA dose not limit restitution to the amount specified in an indictment. Furthermore, the amount of loss is put forward as only one factor that the court must consider. The statute obviously gives a sentencing court some discretion in determining the proper restitutive amount. *See Berrios*, 869 F.2d at 29.

Section 3580(e) provides for estoppel in subsequent civil proceedings:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

18 U.S.C. § 3580(e) (1982). If Congress had intended to limit the amount of restitution to that attributable to the offense of conviction, subsection (e) would not have needed to employ the phrase "for an offense involving the act giving rise to restitution" but instead could have simply stated "for an offense giving rise to restitution." The phrase "involving the act" would be useless surplusage if such a limited reading was intended. It is our duty to give effect to every clause and word of a statute, if possible. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.CT. 513, 520, 99 L.Ed. 615 (1955) (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431 (1883)). Inclusion of the phrase "involving the act" "implies that the acts for which restitution may be ordered must be related to the offense of which defendant is convicted, but that those acts may extend beyond the boundaries of the offense itself." *Berrios*, 869 F.2d at 29.

An analysis of the history of the VWPA further confirms a broader reading of the term "the offense." If "offense" was meant to be limited purely to the offense for which defendant is convicted, the VWPA could have been written as was the Federal Probation Act (FPA). The FPA provided that a defendant "[m]ay be required to make restitution . . . to aggrieved parties for . . . loss caused by the *offense for which conviction* was had." 18 U.S.C. § 3651 (1982) (repealed effective November 1, 1986, pursuant to § 235 of Pub.L. 98-473) (emphasis added). The VWPA contains no such limiting language. *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986); *see also Berrios*, 869 F.2d at 28-29.

Even under the more restrictive language of the FPA there was a division among the Circuit Courts on whether restitution was in fact limited to the amount charged in the indictment. *Compare United States v. McMichael*, 699 F.2d 193, 195 (4th Cir. 1983) (allowing restitution outside of amount alleged in indictment, as long as it was an actual damage directly caused by illegal activity with which defendant was charged) *with United States v. Black*, 767 F.2d 1334, 1343 (9th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985) (limiting restitution to amounts alleged in indictment) and *United States v. Hawthorne*, 806 F.2d 493, 501 (3rd Cir. 1986) (restitution limited to losses attributable to offense of conviction). Congress must have been aware that such a limitation was placed on the FPA by some courts. Given the absence of any limiting language in the VWPA, it is reasonable to infer that Congress did not intend to limit victim compensation to the amount specified in the indictment. *Hill*, 798 F.2d at 405.[5]

Furthermore, it is clear from the legislative history of the VWPA that one of the principal purposes of the Act was to ensure that wrongdoers, to the degree possible, make their victims whole. *See* S.Rep. No. 532, 97th Cong.,

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[5] This Court has explicitly held that district courts have the authority "to order a defendant to pay restitution in an amount greater than the loss alleged in the indictment." *United States v. Kirkland*, 853 F.2d 1243, 1250 (5th Cir. 1988). *Kirkland* is not dispositive beyond its facts, however, because the restitutive amount was specifically addressed in the plea bargain to which the defendant agreed. This is distinguishable from Hughey's case, because Hughey's plea bargain was silent on the issue of restitution.

2nd Sess. 30, *reprinted in* 1982 U.S.Code Cong. & Admin. News 2515, 2536-37. That such was a principal purpose of the VWPA has been repeatedly recognized by numerous appellate courts. *See United States v. Duncan*, 870 F.2d 1532, 1535 (10th Cir. 1989); *Berrios*, 869 F.2d at 29-31; *United States v. Pomazi*, 851 F.2d 244, 248-49 (9th Cir. 1988); *Hill*, 798 F.2d at 405-407; *United States v. Anglian*, 784 F.2d 765, 767-68 (6th Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986).

Given the compensatory objectives of the VWPA, it is difficult to justify limiting restitution to either the particular counts or amounts charged in the indictment. It is important to note that a prosecutor's decision regarding the number of counts with which to charge a defendant is discretionary. Factors may figure into that determination which have little or nothing in common with the congressional objective of compensating crime victims. The decision as to which counts should be the subject of prosecution may be based upon office policy, the strategic use of certain criminal transactions as evidence, or evidentiary considerations geared to securing convictions based on a "beyond a reasonable doubt" standard. Usually of less immediate concern is the victims' financial loss, which is judged by the less onerous "preponderance of the evidence" standard.

Finally, if restitution were limited to the count of conviction, given the high levels of plea bargaining within our criminal system, in the majority of cases a victim could not be made whole. Congress was not unaware of the pervasive phenomenon of plea bargaining when it passed the VWPA. It is not persuasive to attribute Congress with its stated intent of providing for the full

restitution of victims yet simultaneously shaping the statute so that it could be rendered substantially nugatory through plea bargaining. *See Berrios*, 869 F.2d at 30. We therefore find that both the statutory language and history affirm a trial court's power to assess restitution for losses caused by offenses not charged in the indictment.

C. *Case Authority*

Hughey's case presents a specific set of circumstances which are of first impression in this Circuit. It requires restitution under the VWPA for a loss greater than that attributable to the offense of conviction when: (1) the defendant was charged with multiple offenses, and the various counts are similar to each other; (2) the plea bargain was silent on the issue of restitution; (3) the defendant did not acknowledge the government's proposed restitutive figure as correct, but neither did he challenge the amount put forward; (4) each of the offenses which were not charged in the indictment but form the basis for the restitutive amount involved the same defendant the same victim, and the same type of crime; (5) none of the counts, however, alleged a conspiracy or scheme.

Case authority in other circuits supports the broader interpretation of the term "offense" in circumstances such as Hughey's. Both the Second and Tenth Circuits have held that restitution under the VWPA is not limited to the offense of conviction in cases in which the factual circumstances closely parallel Hughey's. *Berrios*, 869 F.2d 25 (2nd Cir. 1989); *United States v. Duncan*, 870 F.2d 1532 (10th Cir. 1989). *See also United States v. Spambanato*, 876

F.2d 5 (2nd Cir. 1989) (applying *Berrios* in parallel circumstances). In *Berrios* the defendant pleaded guilty to one count of mail theft and the other counts were dropped. The Second Circuit held beyond cavil that the district court had the authority to order Berrios to make restitution of the full amount of loss attributable to his related criminal course of conduct as long as he was forewarned such restitution might be ordered and he was given an opportunity to contest any allegations as to the amount of loss he was supposed to have caused. *Berrios*, 869 F.2d at 32.[6]

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[6] It might be argued that *Berrios* is distinguishable from the circumstances of Hughey's case because the *Berrios* Court found and relied in part on the fact that Berrios acknowledged guilt for the criminal acts of which he was not convicted. The Court made much of the fact that Berrios acknowledged responsibility for his victim's entire loss in order to receive a lenient sentence. *Berrios*, 869 F.2d at 32-33. While this is true, Berrios contended throughout the trial and appellate proceedings that although he had a "moral obligation" to repay the full amount, he did not concede liability for, nor agree to make restitution of, any amount higher than the sum charged in the information to which he pleaded guilty. *Id.* at 28.

The Second Circuit held that VWPA did not "limit the sentencing court's restitutionary [sic] authority to the amount specified in the charge on which the defendant is convicted where the victim of that offense also suffered other losses as a result of the defendant's related course of conduct." *Id.* at 32. The Court held that the amount of loss must "either be conceded by the defendant or be adjudicated by the court." *Id.* Thus even if the *Berrios* decision relied to some extent on Berrios' concessions, the rule as fashioned by the Court applies to cases such as Hughey's where the defendant is completely silent regarding the criminal acts alleged to have caused loss, and the court determines the amount of loss independently.

Similarly in *Duncan*, after an analysis of the language and purpose of the VWPA, the Court concluded:

> [T]he VWPA does not restrict a sentencing judge to considering only those acts for which conviction was had, or for which the defendant pleaded guilty. The judge ordering restitution under the VWPA is free to look beyond the indictment to other acts committed by the defendant that caused a loss to the victim. . . .
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> . . . .
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> . . . the VWPA does not prohibit an award of restitution based upon criminal activity that does not encompass the elements of the crime for which the defendant pleaded guilty, if there is a sufficient connection between such crimes.
>
> We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for such losses resulting from such acts if the Government can prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

Duncan, 870 F.2d at 1536-37.

Hughey argues that restitution for losses beyond those attributable to the offense of conviction may be ordered only if the offense of conviction involved either a conspiracy or a "scheme." In such circumstances, it is conceded that the non-convicting offenses may be considered part of or in furtherance of the offense of conviction. But, the rule the *Duncan* Court fashioned and then employed did not rely on the "scheme" rationale, although Duncan's offense of conviction was mail fraud,

which had been found to involve a "scheme." *See United States v. Angelica*, 859 F.2d 1390 (9th Cir. 1988); *United States v. Pomazi*, 851 F.2d 244, 249 (9th Cir. 1988). *Duncan* did refer to a "scheme" but only to establish that the forgery of check endorsements was closely enough related to the mail fraud conviction to allow broader restitution:

> Although the precise contours of the scope of "offense" under the VWPA must be determined under the facts of each case, *we interpret the VWPA to permit an order of restitution for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered,* when there is a *significant connection* between those other criminal acts and the crime for which the guilty plea was entered.

Duncan, 870 F.2d at 1536 (emphasis added). As long as there is a *significant connection* between the crime of conviction and the other offense, there is no requirement that a conspiracy or scheme need be shown to justify restitution beyond the offense of conviction.

Two other cases, while not duplicating Hughey's factual situation, support the trial court's order of restitution: *Hill*, 798 F.2d 402 (10th Cir.1986); *Pomazi*, 851 F.2d 244. The *Hill* court held:

> [I]n determining the amount of loss to a victim for purposes of awarding restitution under VWPA, a district court *is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment*. . . .[A] district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense," 18 U.S.C. § 3580(a), so long as this amount is supported by a preponderance of the evidence.

Hill, 798 F.2d at 406 (emphasis added). *Hill* is distinguishable from the case at hand because the defense attorney acknowledged the accuracy of the court's restitutive amount and there was no plea bargain. Nevertheless, the court laid down the same broad rule which we employ in this case.

In *Pomazi*, the Ninth Circuit ordered restitution to numerous victims of the defendant's mail fraud scheme, although, pursuant to a plea bargain, the defendant was convicted of only two counts of mail fraud involving one victim. Hughey argues that *Pomazi* employs the scheme rationale because it only addresses cases in which "the crime charged involves a scheme to defraud" in its final holding, and hence it is not directly on point. *Id.* at 250. The broad rule and the logic it employs, however, provide strong support for the decision of the district court in this case.

Hughey urges as countervailing authority three cases: *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985); *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987); and *United States v. Mischler*, 787 F.2d 240 (7th Cir. 1986). In *Durham* the Sixth Circuit held restitution could only be ordered for the offense of conviction, a narrower reading of the term "offense" than the District Court employed in the case before us. The *Durham* court, however, also held the term "victim" was intended to be interpreted broadly. Hence, the Sixth Circuit found that "Congress intended a 'victim' to be a person who suffered injury as a result of the defendant's actions that surrounded the commission of the offense, regardless of whether the actions are elements of the offense charged."

Durham, 755 F.2d at 513. Durham pleaded guilty to bank robbery but challenged the court's authority to order restitution for arson which destroyed an automobile during the course of the robbery. Although Durham was not convicted of arson, because the arson was committed and the car destroyed during the course of his escape from the bank robbery, the insurer of the automobile was considered a victim of Durham's offense of conviction.

The Sixth Circuit employed similar logic in *United States v. Mounts*, 793 F.2d 125 (6th Cir.), *cert. denied*, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986). Mounts pleaded guilty to one count of illegally receiving explosives. He was ordered to make restitution for the damage to a company whose safe he attempted to blow up and whose automobile he destroyed in his attempt to escape. The district court awarded restitution based on the losses related to the business equipment and the stolen automobile. As the Tenth Circuit pointed out in *Duncan*,

> Although the Sixth Circuit purports to apply a restricted definition of "offense," [footnote omitted] we believe that the result in *Mounts* regarding restitution for damage to the stolen Corvette and for losses attributable to stolen business property is consistent with the definition of 'offense' applied in *Hill* and *Pomazi*. This result demonstrates that the VWPA does not prohibit an award of restitution based upon criminal activity that does not encompass the elements of the crime for which the defendant pleaded guilty, if there is a sufficient connection between such crimes.

Duncan, 870 F.2d at 1537. We agree with this interpretation of *Mounts* and *Durham*, believing (with the

Tenth Circuit) that *Mounts* and *Durham* support our interpretation of the VWPA because the narrow definition of "offense" was "effectively obliterated" by applying the broad definition of "victim." *Id.* at 1537 n. 2. To the extent that the narrow definition of "offense" might limit restitution under the VWPA, however, we decline to accept the reasoning of the Sixth Circuit.

Hughey's Eleventh Circuit case, *Barnette*, states that the amount of restitution under the VWPA and FPA "may not exceed the actual losses flowing from the offense for which the defendant has been convicted." *Barnette*, 800 F.2d at 1571-72. The *Barnetie* Court, however, applied its holding to both the FPA and the VWPA in its two paragraph consideration of the issue, and did not cite any VWPA case as authority. It did not address the VWPA provisions separately. Given the differences between the two acts, we find *Barnette* not clearly in point.

Finally, the Seventh Circuit case cited, *Mischler*, 787 F.2d 240, is not applicable to the facts of our case. The trial court was held to have abused its discretion in ordering broad scale restitution for all counts of the indictment. The Mischlers, unlike Hughey, challenged the factual accuracy of the restitutive amount assessed, but were not given an opportunity to elaborate the basis for their challenge. The district judge was also found not to have relied on accurate information in determining the restitution. No such inaccuracy of calculation has been shown or alleged by Hughey.

A stronger case for Hughey's position from the Seventh Circuit is *United States v. Paul*, 783 F.2d 84 (7th Cir. 1986). Paul pleaded guilty to embezzlement and was

ordered to make restitution of a greater amount than she had admitted to having embezzled. She failed to object to the computation of the amount of restitution at the time of sentencing (unlike the Mischlers). *Paul* held, however, that when imposing restitution greater than that charged in the relevant count, the defendant must obtain the proceeds "as part of an ongoing scheme to defraud which extends over time, and . . . the amount of damages to the victim [must be] established with specificity and [be] admitted to by the defendant in the indictment, the plea agreement and presentence proceedings." *Paul*, 783 F.2d at 88. This rule was first enunciated in *United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir. 1982). The *Paul* Court explicitly concluded that:

> [T]he government's interest in leaving the precise amount of restitution undetermined until the sentencing stage is very slight. . . .[T]he interests of due process and fairness to the defendant require that the government satisfy the *Davies* test at the plea bargaining stage before an amount of restitution greater than that charged can be ordered.

Paul, 783 F.2d at 89. To the extent that the *Davies* test, as employed in *Paul*, would prevent a district court from ordering restitution under the VWPA greater than that charged in the indictme , we find it would cripple proper application of the WPA.

We conclude that the VWPA permits a court to require restitution beyond that amount involved in the offense of conviction when there is a significant connection between the crime of conviction and similar actions justifying restitution. This is the law also of the Second, Ninth, and Tenth Circuits as seen in *Berrios*, *Pomazi* and

Duncan, respectively. We do not need in the case before us further to define at this time what constitutes a "significant connection" between the offenses of indictment or conviction and those additional acts for which restitution was ordered. In this case, the nexus is strong. Here the restitution order involved the same defendant, the same victim, and multiple identical criminal offenses.

II. Standard of Proof and Sentencing Procedure

Hughey argues that imposition of restitution pursuant to the VWPA imposes "criminal responsibility" for the offenses which form the basis of the restitutive order. Hence, he maintains that the preponderance of the evidence standard is inapplicable and that he must be found guilty of these offenses under the criminal standard of "beyond a reasonable doubt."

This argument is made without citation to any authority and misconstrues the purpose of the VWPA. The purpose of the Act is restitutive, and restitution is assessed as part of sentencing. It is not a finding of "criminal responsibility." The VWPA clearly provides for a preponderance of the evidence standard of proof. 18 U.S.C. § 3580(d).[7]

---

[7] 18 U.S.C. § 3580(d) (1982) provides:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the

(Continued on following page)

Hughey's standard of proof argument, however, does raise the issue of what procedural safeguards are required before restitution can be imposed for offenses which are not the basis of a conviction. Under the VWPA a court may order restitution to any victim, § 3579, based on information gathered and furnished by the probation service, § 3580. Pursuant to Rule 32 of Fed.R.Crim.P., the presentence report furnished by the probation service must contain information about the financial harm or loss suffered by any victim. That report must be timely disclosed to the defendant who may challenge any factual inaccuracy it contains. *United States v. Patterson*, 837 F.2d 182, 183 (5th Cir. 1988). In addition, the defendant must be forewarned that restitution may be ordered in an amount higher than the crime of conviction, and he must be given an opportunity to contest any allegation as to the amount of loss he has supposed to have caused. *United States v. Corn*, 836 F.2d 889, 893-94 (5th Cir. 1988); *Berrios*, 869 F.2d at 32; *Mischler*, 787 F.2d at 246-47. *See also* Fed.R.Crim.P. 11(c)(1). However, "nothing in the text or legislative history of the VWPA [indicates] that Congress intended the sentencing hearing to be transformed into a second trial on the issue of restitution." *United States v. Cloud*, 872 F.2d 846 (9th Cir. 1988).

(Continued from previous page)

attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

Hughey was notified ahead of time that the broader restitution would be sought. His attorney briefed these issues well in presentence hearings. Hughey was not the victim of any unfair surprise. The government bears the burden of proving the amount of loss sustained by the victim, but the burden of demonstrating the defendant's lack of financial resources is upon him. § 3580(d). The government in this case came forward with proffered testimony for the purpose of proving the amount of financial loss for which Hughey was responsible. Hughey stipulated that this testimony was admissible, and while he did not admit that any of it was true, neither did he dispute the accuracy of the calculation of the amounts proposed. Given the testimony, the government clearly met its burden of proving the losses by the preponderance of the evidence. The burden then shifted to the defendant to challenge that estimate of loss. He did not do so. It is unacceptable for a defendant to be able to agree to a plea bargain and then by maintaining his silence, thwart the VWPA's restitutive purpose in the face of persuasive evidence of losses he has caused.

In the absence of any challenge to the accuracy of the district court's assessment, we need not further explore any constitutional claim on this ground. *Durham*, 755 F.2d at 514.

III. Defendant's Financial Resources

Finally, Hughey argues that the court did not properly assess his indigency, and that it did not give adequate consideration to a "compromise" figure which he proposed for restitution. In failing to do so, he urges, the

court did not build an adequate record for consideration upon appeal. These claims can be refuted with brevity.

First, the Act states that the sentencing court shall consider the amount of loss sustained by any victim, the financial resources of the defendant, his financial needs and earning ability, the needs of his dependents, "and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a). The defendant's financial resources are only one factor to be considered in a nonexhaustive list provided by the statute.[8] Another factor which may be considered is the culpability of the defendant. *United States v. Anglian*, 784 F.2d 765, 768 (6th Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986). We have recently held that indigency does not bar a restitutive award under the VWPA. *United States v. Ryan*, 874 F.2d 1052, 1054-55 (5th Cir. 1989). *See also Mounts*, 793 F.2d at 128. Furthermore, the trial judge had Hughey's financial information at his disposal, and stated that he had examined it. This demonstrates sufficient consideration of the statutory factor. *United States v. Atkinson*, 788 F.2d 900, 902 (2nd Cir. 1986).

Hughey offered to pay for all losses attributable to the Godfrey credit card, the credit card used in the

---

[8] 18 U.S.C. § 3580(a) (1982) provides:

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

offense to which he pleaded guilty. The district court, however, required him to make restitution in full for all offenses for which the government offered proof as against the same victim, the bank. The VWPA provides that "[i]f the court does not order restitution, or orders only partial restitution under this section, the court shall state on the record the reasons therefore." 18 U.S.C. § 3579(a)(2). There is no mention in the statute of any requirement that a court must also state on the record reasons for ordering full restitution. It is apparent from the statute that restitution in full is to be considered the norm. Restitution in part is a deviation from that norm and requires an explanation in the record. Nevertheless, *Hughey* argues that explicit factual findings should have been made by the district court in reference to his compromise offer.

We have recently held that:

> The decision to assign reasons is committed to the sound discretion of the district court, guided by this singular inquiry – absent an assignment of its reasons, does the record contain sufficient data for the appellate court to perform its mandated review? If the record provides an adequate basis for that review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.

Patterson, 837 F.2d at 183-84. The record in this case contains a presentence investigation report by the United States Probation Office, which detailed the defendant's financial resources. Coupled with the district court's detailed order (which denied the defendant's Rule 35 motion) and the government's offer of proof, an adequate

record on which to review this case was provided. *See Ryan*, at 1054. Given the record in this case, there was no need for an explicit finding by the district court regarding the compromise offer. *Patterson*, 837 F.2d at 184. *See also United States v. Cannizzarro*, 871 F.2d 809, 810-11 (9th Cir. 1989). The defendant's assertion that there is not an adequate record for this Court to perform its appellate review is without merit.

Conclusion

Hughey's guilty plea to the one offense of misuse of a credit card, in conjunction with the government's offer of proof, formed a sufficient basis for the district court to order restitution. The restitution order properly exceeded the amount involved in the offense for which conviction was obtained since the restitution ordered had a "significant connection" with the conviction offense. The proper standard of proof was employed by the district court, and there was a sufficient record upon which to base the order of restitution. The district court's denial of Hughey's rule 35 motion must be affirmed.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 89-5691

Frasiel L. Hughey,

Petitioner

v.

United States

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

The parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondent must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990.

January 8, 1990

Supreme Court, U.S.
FILED
FEB 6 1990
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CLERK

No. 89-5691

In The

Supreme Court of the United States

October Term, 1989

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May a defendant, who pleads guilty to a single offense which is neither a conspiracy nor a scheme, be required to make restitution under the Victim and Witness Protection Act for criminal acts outside the offense of conviction, where the defendant neither admits responsibility for those other criminal acts nor consents to an order of restitution outside the count of conviction?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.; J.A. 86-110) is reported at 877 F.2d 1256 (5th Cir. 1989). The memorandum order of the district court (J.A. 82-85) is not reported.

JURISDICTION

The decision of the court of appeals (Pet. App.; J.A. 86-110) was announced on July 27, 1989. The petition for certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATUTORY PROVISIONS INVOLVED[1]

Title 18 U.S.C. § 3579(a)(1) and § 3580(a) and (d) provided, at the time of imposition of sentence upon Petitioner:

---

[1] The full text of 18 U.S.C. §§ 3579, Order of restitution, and 3580, Procedure for issuing order of restitution, as in effect on the date of Petitioner's sentencing, are set out in the Appendix to this Brief at A-1–A-6.

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

. . . .

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

STATEMENT

Petitioner Frasiel L. Hughey (hereinafter Petitioner) was charged by superseding indictment in the Western District of Texas with three counts of mail theft in violation of 18 U.S.C. § 1709 and with three counts of fraudulent use of a credit card, in violation of 18 U.S.C. § 1029(a)(2).[2] (J.A. 3-6) The parties negotiated a settlement of the case whereby, in exchange for Petitioner's plea of guilty to Count Four of the indictment, Respondent agreed to dismiss the remaining counts, and further agreed that it would not prosecute Petitioner for any other related offenses in the Western District of Texas. (J.A. 7-8) Count Four of the indictment charged Petitioner with the fraudulent use of a credit card issued by MBank to one Hershey Godfrey, in an amount in excess of $1,000.[3] (J.A. 4-5)

---

[2] This latter statute, under which Petitioner eventually pled guilty, provides in pertinent part:

> (a) Whoever—
>
> . . . .
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;
>
> . . . .
>
> shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

18 U.S.C. § 1029(a)(2).

[3] Count Four of the superseding indictment read:

> That on or about October 18, 1985, in the Western District of Texas, and elsewhere, Defendant,

(Continued on following page)

The parties had no agreement as to any aspect of the sentence. The possibility of restitution was never discussed. (J.A. 7-8) The first mention of restitution occurred at the plea proceeding, during which the district court advised Petitioner in general terms that "in addition to any term of imprisonment or fine imposed by the Court *for the offense to which you are pleading guilty*, you may be required to make restitution in the form of money for any property loss suffered by the victim *as a result of this offense*." (J.A. 9) (Emphasis added.) Petitioner was never advised prior to his plea that he could be ordered to pay restitution for MBank's losses over and above the count of conviction.

During its proffer of the factual basis in support of Petitioner's plea, Respondent stated to the court that Petitioner, while employed by the United States Postal Service, had stolen the Godfrey credit card, as described in Count Four of the indictment, "as well as a number of other cards." (J.A. 10) Petitioner promptly informed the court that, in pleading guilty, he was not acknowledging or responding to any allegations except those which pertained to the Godfrey count. (J.A. 11) Petitioner restated this position at every pertinent point in the proceedings.

(Continued from previous page)

FRASIEL L. HUGHEY,

did knowingly and with intent to defraud use an unauthorized access device, to-wit: MBank Mastercard Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Crosby, Texas 77532, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

(J.A. 29, 46, 48) Respondent never interposed any objection to Petitioner's express limitation of liability.

After his plea, but prior to sentencing, Petitioner was notified by the Probation Office that he might be required to make restitution to MBank in the amount of $147,646.89. (J.A. 12) Pursuant to local procedure, Petitioner filed timely, written objections to the proposed restitutory figure, but offered in open court to make restitution in the amount of $10,412—the sum representing MBank's total losses as a consequence of Petitioner's fraudulent use of the Godfrey credit card, as described in the count of conviction. (J.A. 12-14, 32, 35, 44)

At the sentencing hearing, Respondent took the position that Petitioner owed MBank $90,431 in restitution, a revised sum which represented MBank's total losses from the unauthorized use of 21 of its credit cards issued to Godfrey and others. (J.A. 41-42, 44, 49) In an effort to establish Petitioner's liability for MBank's losses outside the offense of conviction, Respondent introduced a written stipulation in evidence at sentencing. (J.A. 53-57) As expressly stated in the document, however, the stipulation set forth expected testimony only and did not constitute a stipulation of fact. (J.A. 57) With this proviso, Petitioner did not object to the introduction of the stipulation at sentencing. (J.A. 29)

In substance, the stipulation presented the following expected testimony:

1) One Clarence Thompson told Secret Service Agent Scott Jones that Petitioner gave Thompson 15 VISA or Mastercharge cards issued by MBank, and admitted getting them from the post office where he worked.

2) A business person identified Petitioner to a Postal Inspector as the individual who had used an MBank Mastercharge card issued to James R. Windom.

3) Petitioner's postal supervisor would testify that Petitioner had access to MBank's post office box in connection with his duties.

4) An MBank investigator would testify that:,

a) Thomas Beatty said Petitioner provided him with three MBank charge cards issued to others.

b) Business persons identified Petitioner in possession of two MBank cards issued to others.

c) All of those listed cardholders reported that they had moved; that they had not received their cards; and that they were billed for unauthorized charges.

d) The envelopes sending out those charge cards to cardholders were marked "Do Not Forward – Return to Sender" at the MBank postal box to which Petitioner had access.

e) The total loss to MBank on those cards was $90,431. (J.A. 53-57)

In response, Petitioner reemphasized in open court that the stipulation was solely as to testimony, not facts, and that he was not making any admission as to any fact contained therein. (J.A. 29) Further, Petitioner interposed his objections to any restitutory order in excess of the $10,412 which could be attributed to his use of the Godfrey credit card on the ground that such an order would

exceed the court's authority under the Victim and Witness Protection Act ("VWPA") and would not fairly take into account his ability to pay. (J.A. 32, 44, 47, 74-75)

The district court sentenced Petitioner to a term of eight years confinement in the custody of the Attorney General, and ordered him to pay restitution to MBank in the amount of $90,431 during the term of his parole. (J.A. 77-78)

Petitioner challenged the legality of the court's restitution order in a timely "Motion to Reduce Sentence and to Correct an Illegal Sentence" filed under authority of Rule 35, F.R.Crim.P. (J.A. 80-81) The district court's denial of that motion, (J.A. 82-85), was affirmed on appeal by the Fifth Circuit Court of Appeals. (Pet. App.; J.A. 86-110) In so doing, the court of appeals concluded that the VWPA permits a restitution order beyond the amount involved in the offense of conviction when "there is a significant connection between the crime of conviction and similar actions justifying restitution." *United States v. Hughey*, 877 F.2d 1256, 1264 (5th Cir. 1989) (J.A. 104). The court found that nexus to be strong in Petitioner's case because it found that "the restitution order involved the same defendant, the same victim, and multiple identical criminal offenses." 877 F.2d at 1264 (J.A. 105)

This Court granted certiorari on January 8, 1990. (J.A. 111)

SUMMARY OF ARGUMENT

Petitioner will show that the restitution provision of the Victim and Witness Protection Act of 1982 ("VWPA")

is limited to losses flowing from the offense of conviction. Petitioner's argument is divided into three parts. Petitioner will show first that examination of the clear language of the statute, the initial step in applying a penal provision, requires limitation of restitution to a victim of the offense of conviction. If, however, the Court should find any ambiguity which warrants interpretation, Petitioner will show that the customary rules of statutory interpretation demonstrate conclusively the correctness of the restrictive interpretation. Finally, Petitioner will show that the limited exceptions to restrictive application of the restitution statute developed by the courts of appeals do not apply to this case, because none are even arguably present, and the court below did not rely upon them.

I

Where the meaning of a statute is plain from its clear and unambiguous language, the duty of the courts is to enforce it as written. As this is such a case, this Court should declare that the VWPA on its face permits restitution only to a victim of the offense of conviction.

A. Absent a clearly expressed legislative intent to the contrary, statutory terms are understood to carry their ordinary meaning, and the unambiguous language of a statute is conclusive as to its meaning. Since the clear language of the VWPA limits restitution to the offense of conviction, this Court need not resort to the rules of statutory construction.

B. The operative language of § 3579(a)(1) is: "The court, when sentencing a defendant convicted of an

offense . . . may order . . . that the defendant make restitution to any victim of such offense." By ordinary rules of sentence construction, the term "such offense" must be taken to refer back to the antecedent phrase "convicted of an offense." This plain meaning is confirmed by reference to other portions of the restitution provisions, which refer consistently to "the offense," in contexts which cannot mean anything other than the offense of conviction. This is so because of both the plain meaning, and the assumption that identical words used in different parts of the same act have the same meaning.

The court of appeals recognized that these statutory provisions by themselves point to a limitation of restitution to the offense of conviction. The lower court went on, however, to read other portions of the VWPA so as to create an ambiguity, which it resolved in favor of an expansive interpretation of this criminal statute. First, the court of appeals examined § 3580(a), which directs the sentencing court to consider both the victim's loss and specified factors bearing on the defendant's ability to pay restitution, followed by a catch-all phrase, "such other factors as the court deems appropriate." Rather than restrict this general phrase to the character of the more specific factors which precede it, the lower court erroneously took it to mean that Congress had intended to expand the restitutory authority beyond the count of conviction. Next, the lower court found some redundancy of language in § 3580(e), which estops the defendant from denying the essential allegations of the offense of conviction in a subsequent civil proceeding brought by the victim. The language in question is easily understood as related to the specific nature of estoppel, and in service of

a different purpose than § 3579(a)(1), which establishes restitutory liability. It provides no basis for finding that Congress intended a major transformation of the law of restitution as a penal sanction. Finally, the court of appeals took the fact that Congress did not perpetuate in the VWPA the precise phrasing of the Federal Probation Act ("FPA"), restricting restitution to "the offense for which conviction was had," to mean that the restriction had been abandoned. This Court has recognized, however, that a minor change in wording, without more, cannot be taken to effect a major change in the meaning of a statute.

In sum, the restitutory provisions of the VWPA admit of only one meaning—that Petitioner may be ordered to make restitution only to a victim of the offense of conviction. As a court has no inherent power to order a defendant to pay restitution, the judgment in this case exceeded statutory authority and must be reversed.

II

If this Court should find that there is any ambiguity in the restitution provisions of the VWPA, then reference to traditional rules of statutory construction compels the conclusion that restitution is limited to the offense of conviction.

A. Where statutory language leaves an ambiguity, it is proper to look to the legislative history to aid in construction of the statute. The most authoritative legislative history of both the original enactment of the VWPA and the 1986 clarifying amendment confirms that Congress

intended that restitution be limited to losses sustained by a victim of the offense of conviction.

1. The Senate Report on the VWPA reflected an awareness of language of the FPA limiting restitution to the offense of conviction. It went on to identify five major problems of existing law, none of which was limitation to the offense of conviction. The Report then explained § 3579(a) by saying that it expanded current law by authorizing an order of restitution independent of a condition of probation. The Report nowhere identifies expansion of the restitution authority beyond the offense of conviction as a purpose of the bill, which would certainly be expected if so radical a change had been intended.

2. A House Report authoritatively explained the 1986 clarifying amendment of § 3579(a)(1), which changed the phrase "any victim of *the* offense" to "any victim of *such* offense." (Emphasis added.) Noting questions which had been raised in law journals as to the meaning of the phrase, the House Judiciary Committee declared in language as direct and explicit as can be imagined, that the reference to "the offense" in § 3579(a)(1) was to the offense for which the defendant has been convicted and is being sentenced. The Committee went on to say that the reference would be changed from "the offense" to "such offense" because the change in phraseology, even though unnecessary because it would not alter the meaning of the provision, could do no harm. The Committee emphasized that the change did not alter the meaning of the provision. There is no indication that the court of appeals considered this highly pertinent legislative statement, which is conclusive as to the meaning of the amended statute under which Petitioner

was sentenced. Where the legislative intent is so plainly expressed, and consistent with the clear statutory language, Petitioner's right to relief is clear.

B. Any ambiguity in the restitution portion of the VWPA must be resolved by narrow construction of the statute because restitution is a penal sanction. The punitive nature of a restitution order was both understood and intended by the Congress, and this Court has also recognized that a restitution order is punishment. The court of appeals violated the rule of lenity, which aids in the construction of doubtful criminal statutes, by adopting an interpretation which increases rather than limits the punishment of restitution.

C. Finally, a narrow construction of the restitution power is compelled because the expansive interpretation threatens constitutional problems which otherwise would not arise. Ignoring this precept, the court of appeals enunciated a "significant connection" test which represents a radical departure from accepted notions of criminal liability. The restitution provisions must be limited to the offense of conviction in order to avoid impairment of the constitutional right to due process of law.

III

The circuit courts of appeals have identified certain limited exceptions to the statutory restriction of restitution to the offense of conviction. They include (1) cases where a defendant is convicted of an offense which is conspiracy, or which has as an element a scheme to defraud, encompassing uncharged losses; (2) cases where a defendant expressly admits, or does not dispute that he

committed the collateral criminal conduct; and (3) cases where a defendant agrees, as part of the plea agreement or during the sentencing hearing, to make restitution beyond the offense of conviction. This Court need not, in this case, address the correctness of those exceptions because none of them are even arguably present in this case, and because the court below did not rely upon them in fashioning its "significant connection" rule.

ARGUMENT

I. THE LIMITATION OF RESTITUTION TO THE COUNT OF CONVICTION IS CLEAR FROM THE PLAIN LANGUAGE OF THE STATUTE.

A. Legal Principles.

This Court has ruled that, in the absence of a clearly expressed legislative intent to the contrary, the unambiguous language of a statute must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981). *See also Ford Motor Credit Company v. Cenance*, 452 U.S. 155, 158 n.3 (1981). Accordingly, where resolution of a question of federal law turns on a statute and the intent of Congress, courts must look first to the language of the statute itself, and they will only look to legislative history if the statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1504 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). Should this Court find that the language of the statute limits restitution to the offense of conviction, then "the rules which are to aid doubtful

meanings need no discussion." *Caminetti v. United States*, 242 U.S. 470, 485-486 (1917).

B. The Language of the Statute is Clear and Unambiguous.

Petitioner submits that this Court's inquiry need go no farther than the face of the statute itself, which plainly states that the amount of restitution is limited to the loss sustained as a result of the offense for which the defendant has been convicted and is being sentenced. The starting point is § 3579(a)(1), which provided on the date of Petitioner's sentencing that

> The court, when sentencing a defendant convicted of an offense . . . may order . . . that the defendant make restitution to any victim of *such* offense.

18 U.S.C. § 3579(a)(1), as amended by P.L. No. 99-646, § 79(a), 100 Stat. 3619 (Nov. 10, 1986) (emphasis added). As may be seen, § 3579(a)(1) uses the word "offense" twice—it first refers to "an offense" for which the defendant has been "convicted" and is undergoing "sentencing," and it immediately thereafter refers to "such offense." In this context, the term "such offense" necessarily refers back to the single offense of which the defendant has been convicted and is being sentenced. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 25 n.8 (1982) (holding that the term "such person" clearly "refers back" to the prior use of the term "persons" in the same sentence).

Section 3579(a)(1) therefore unambiguously answers two questions. It makes clear, first, that the term

"offense," as used in the VWPA, means the offense of conviction. And § 3579(a)(1) also states clearly that the defendant may be ordered to make restitution only to a victim of the offense of conviction—in this case, to MBank.

We acknowledge, however, that § 3579(a)(1) does not necessarily answer the question of *how much* restitution a defendant may be ordered to pay to the victim of the offense of conviction.[4]. But that question is clearly and unambiguously answered in Petitioner's favor by § 3580(a) and (d). Section 3580(a) states in pertinent part that

> The court, in determining . . . the amount of such restitution, shall consider the amount of the loss sustained by any victim *as a result of the offense.*

(Emphasis added.) Likewise, § 3580(d) declares in relevant part that

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by the victim *as a result of the offense* shall be on the attorney for the Government.

(Emphasis added.) Accordingly, § 3580(a) and (d) both unambiguously limit the amount of restitution to the loss

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[4] It should be noted, however, that § 3579(a)(1)'s limit of restitution to victims of the offense of conviction necessarily means that, where the other alleged offenses involved different victims, restitution is limited to the offense of conviction. Here § 3579(a)(1) does not by itself resolve this case solely because MBank was also the victim of the other alleged offenses.

sustained by the victim "as a result of the offense." Moreover, those provisions use the word "offense" in the singular and must necessarily be read to refer back to the "offense" defined in § 3579(a)(1)—that is, as shown above, the offense of conviction. That is so for two reasons, first as a matter of giving the term its ordinary and obvious meaning, and second, because "[t]he normal rule of statutory construction assumes that ' "identical words used in different parts of the same act are intended to have the same meaning." ' " *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (citations omitted); *see also Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 238-39 (1986); *Morrison-Knudsen Constr. Co. v. Director, OCWP*, 461 U.S. 624, 633 (1983).[5]

The court of appeals recognized that these statutory provisions "by themselves admittedly point" to a limitation of restitution to the offense of conviction. 877 F.2d at 1259 (J.A. 93). But the court purported to find ambiguity in two other provisions. The first is the final phrase of § 3580(a), which states that, in determining whether to order restitution and, if so, in what amount, the sentencing court may consider "such other factors as the court deems appropriate." The court of appeals without explanation found it "obvious" that this authorized restitution in amounts greater than the offense of conviction. But that conclusion is neither "obvious" nor even correct. To

[5] This plain reading is confirmed by § 3579(b), which provides that "in the case of *an offense* resulting in damage to or loss or destruction of property of a victim of *the offense*" the order may require the defendant to "return *the property* to the owner of the property . . . ." 18 U.S.C. § 3579(b) (emphasis added).

the contrary, that phrase on its face is a catch-all provision, in a subsection directing the court to consider both the victim's loss and specified factors bearing upon the defendant's ability to pay. Such a general phrase would, in the absence of express Congressional intent to the contrary, be read to apply to factors of the same character as the more specific phrases which precede it. *See Gooch v. United States*, 297 U.S. 124, 128 (1936). It certainly cannot be construed to override the earlier, express terms of §§ 3579(a)(1) and 3580(a) that limit the amount of restitution to loss caused by the offense of conviction.

Next, the court of appeals found potential surplusage in the words "involving the act" in the collateral estoppel provision of the Act, § 3580(e),[6] because Congress could have provided for collateral estoppel based on "an offense giving rise to restitution" rather than "an offense involving the act giving rise to restitution." 877 F.2d at 1260 (J.A. 93-94). This too is an erroneous conclusion. First, it is more reasonable to conclude that Congress inserted the phrase "involving the act" because collateral estoppel applies to identifiable ultimate facts, *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), and not to statutory offenses. Secondly, § 3580(e) has a different purpose than the restitutory provisions.

[6] Title 18 U.S.C. § 3580(e) provides:

> (e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

Finally, the court of appeals took the fact that Congress did not perpetuate in the VWPA the precise language of the FPA restricting restitution to "the offense for which conviction was had," to mean the restriction had been abandoned. 877 F.2d at 1260 (J.A. 94). This, too, is insufficient to overcome the clear import of the statute, which achieves the same effect in more concise language. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489 n.8 (1985) ("we cannot view this minor departure in wording, without more, to indicate a fundamental departure in meaning").

In sum, §§ 3579(a)(1) and 3580(a) and (d) unambiguously permit only one interpretation—that the defendant may be ordered to make restitution only with respect to the offense of conviction. There is no federal common law of crimes. "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms." *Todd v. United States*, 158 U.S. 278, 282 (1895); *United States v. Casamento*, 887 F.2d 1141, 1177 (2d Cir. 1989) ("a federal court has no inherent power to order a defendant to pay restitution"). In this case, therefore, the district court had no authority to order defendant to make restitution for alleged offenses other than his fraudulent use of a single credit card issued to Hershey Godfrey. The Court need go no farther, and should therefore reverse.

II. EVEN IF THERE IS ANY AMBIGUITY, THE RULES OF STATUTORY CONSTRUCTION COMPEL LIMITATION OF RESTITUTION TO THE OFFENSE OF CONVICTION.

A. The Legislative History Unmistakably Shows Congress's Intent to Limit Restitution to the Offense of Conviction.

1. The Original Enactment Evinced No Intent to Expand Restitution Beyond the Offense of Conviction.

The express purpose of the VWPA, as stated in the Act itself, is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime *without infringing on the constitutional rights of the defendant*." VWPA, P.L. No. 97-291, § 2(b)(2), 96 Stat. 1248 (1982) (emphasis added) (uncodified). It is apparent from the foregoing that Congress, in enacting this remedial legislation, recognized that the restoration of crime victims to a prior state of well-being could not be ordered at the expense of a defendant's traditional constitutional rights. Those rights would include the right to be free from criminal punishment in the absence of an admission or adjudication of guilt, as well as the right to be sentenced on the basis of accurate information. In extending a sentencing court's power to order restitution above and apart from the offense of conviction, the court below gave effect only to the compensatory portion of the statute, *Hughey*, 877 F.2d at 1261 (J.A. 95-96), and ignored those constitutional safeguards which Congress recognized as inherent in criminal proceedings generally.

The principal legislative history of the VWPA is the Senate Report.[7] Discussing Title III—Restitution, the Report quoted the current law of the Federal Probation Act ("FPA"), including the restriction to "loss caused by the offense for which conviction was had." Senate Report at 30. The Report then went on to identify five problems of the then-current law, but neither in the section headed "Problems of Current Law" nor elsewhere in the Report is limitation of restitution to the offense of conviction identified as a problem. Nor is there any indication that Congress meant to achieve a different scope.

The first problem identified in the Report was that under the FPA, a district court could order restitution only as a condition of probation:

> While on probation and among the conditions thereof, the defendant—
>
> . . . .
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> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . .[8]

Thus, there was no statutory basis for an order of restitution if a defendant was sentenced to imprisonment. In keeping with the express language of the statute, courts generally held that restitution ordered as part of a sentence of probation was limited to losses flowing from the

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[7] S. Rep. No. 532, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515-51.

[8] Title 18 U.S.C. § 3651, *repealed*, P.L. 98-473, Title II, c. II, § 212(a)(2), 98 Stat. 1987 (Oct. 12, 1984), as amended by P.L. 99-217, § 4, 99 Stat. 1728 (Dec. 26, 1985), effective November 1, 1987.

offense of conviction. *See, e.g., United States v. Johnson*, 700 F.2d 699, 701 (11th Cir. 1983); *United States v. Black*, 767 F.2d 1334, 1342-44 (9th Cir.), *cert. denied*, 474 U.S. 1022 (1985); *but cf. United States v. McMichael*, 699 F.2d 193, 195 (4th Cir. 1983) (defendant freely admitted the amount of restitution as well as his responsibility for it).

The Report made it abundantly clear that Congress intended by enactment of VWPA to expand the restitution power beyond this limitation to a condition of a probationary sentence. In explaining the provisions of the bill, the Senate Judiciary Committee said:

> *Section 3579(a) expands current law by authorizing an order of restitution independent of a condition of probation*, thereby permitting its use in conjunction with imprisonment, fine, suspended sentence, or other sentence imposed by the court.

Senate Report at 32 (emphasis added). More to the point, the Report nowhere identifies expansion of the restitution authority beyond the offense of conviction as a purpose of the bill, which would certainly be expected if so radical a change had been intended.

2. The 1986 Clarifying Amendment Confirms that Restitution Is Limited to the Offense of Conviction.

The passage of the VWPA prompted a considerable amount of scholarly comment.[9] Much of that comment

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[9] *See, e.g.*, Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L.J. 505 (1984);

(Continued on following page)

concerned the question of whether Congress had expanded restitution beyond the offense-of-conviction limitation of the old FPA. It was the consensus of the commentators that restitution under the VWPA, as under the FPA, must be limited to the offense of conviction.[10]

These commentaries prompted a clarifying amendment in § 3579(a)(1) itself, which was included in the Criminal Law and Procedure Technical Amendments Act of 1986.[11] The amendment did no more than change one word:

> The court, when sentencing a defendant convicted of an offense . . . may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of ~~the offense~~ *such offense*.[12]

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Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507 (1984); Note, *The Victim and Witness Protection Act of 1982: Who Are the Victims of Which Offenses?*, 20 Val. U.L. Rev. 109 (1985).

[10] Note, Yale L.J., *supra* n.9, at 517 ("an 'offense of conviction' rule is supported—even dictated—by the general policy of the Act that the victims' interests should not be promoted to the detriment of the rights of defendants"); Project, Fordham L. Rev., *supra* n.9, at 516-17 ("The offense limitation of the VWPA, therefore, should be interpreted as a conviction-only offense limitation with the restrictive edge dulled by the plea-bargaining and no-contest exceptions."); Note, Val. U.L. Rev., *supra* n.9, at 142 ("The VWPA should be amended so that it clearly states an 'offense of conviction' standard.")

[11] P.L. 99-646, § 79(a), 100 Stat. 3619 (Nov. 10, 1986).

[12] Title 18 U.S.C. § 3579(a)(1), as amended by P.L. 99-646, § 79(a), 100 Stat. 3619 (Nov. 10, 1986) (deleted language struck through; added language in italics).

The accompanying House Report,[13] however, is most telling—not only as to the meaning of the statue, but as to the correct resolution of Petitioner's case. In the section-by-section analysis, the portion pertinent to this inquiry is the analysis of what was Section 6 of H.R. 2713. There, the Committee on the Judiciary specifically took note of the suggestions in law journals that there might be some ambiguity in whether restitution was limited to the offense of conviction. The Committee rejected these suggestions emphatically, and declared categorically that "offense" meant the "offense of conviction":

> This suggestion is without substance. The term "the offense" in the phrase "victim of the offense," by ordinary rules of sentence construction, refers to the term "offense" in the antecedent phrase in the same sentence, "convicted of an offense." Thus, there is really no ambiguity about the meaning of the term "the offense" in the phrase "victim of the offense." *That term means a victim of the offense for which the defendant has been convicted and is being sentenced*. Nevertheless, a change in phraseology, even though unnecessary because it will not alter the meaning of the provision, can do no harm.
>
> Section 6(a) of H.R. 2713, therefore, substitutes the term "such offense" for the term "the offense" in the phrase "victim of the offense." This change does not alter the meaning of the provision.

House Report at 7 (footnotes omitted) (emphasis added).[14] Moreover, the Committee expressly went on to

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[13] H.R. Rep. No. 334, 99th Cong., 1st Sess. (1985) ("House Report").

[14] The full House Report of eleven pages is reproduced in the Appendix to this brief at A-7–A-29, quoted material at

(Continued on following page)

say that because this change in phraseology did not change the meaning of current law, no delay in effective date was necessary. *Id.*

Regardless of the extent to which this 1985 report is probative as to the meaning of § 3579(a)(1) as originally enacted three years earlier, it is unimpeachable authority for the proper interpretation of the amended version of the restitution statute under which Petitioner was sentenced. The section-by-section analysis of the compromise bill referred specifically to Section 6 of H.R. 2713, for which the report was prepared, as the sole origin of the amendment to § 3579(a)(1), citing specifically to the explanatory page of the House Report quoted above:

> Section 79 of the amendment is identical to Section 6 of H.R. 2713, which was passed by the House on October 29, 1985. See H.R. Rep. No. 334, 99th Cong., 1st Sess. 7 (1985). There are no comparable provisions in H.R. 5241 as reported or S. 1236 as passed.

132 Cong. Rec. H11295 (daily ed. Oct. 17, 1986).[15]

In the case at bar, there is no indication that the court of appeals ever considered the conclusive language from the House Report quoted above. There are few, if any, cases in which the legislative intent is so plainly

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A-21. See also H.R. Rep. No. 1017, 98th Cong., 2d Sess. at 82-83 nn. 42-43 (1984) (substantially identical statement with explanatory examples).

[15] *See generally* Hutchison and Yellen, 1 *Federal Sentencing Law and Practice* 433-435 (1989) (tracing the legislative history of the Criminal Law and Procedure Technical Amendments Act of 1986).

expressed. Because that expressed intent is fully consistent with the language of the statute, Petitioner's right to relief is clear.

B. A Narrow Construction is Mandated Because the Statute is Penal in Nature.

An order of restitution under the VWPA is punishment. It is so denominated in the governing statute: "The court . . . may order, in addition to or in lieu of *any other penalty* authorized by law, that the defendant make restitution . . . ." 18 U.S.C. § 3579(a)(1) (emphasis added). The statute thus contemplated that an order of restitution might be the sole punishment inflicted upon one convicted of an offense.[16] The legislative history confirms that Congress understood the restitution sanction to be penal and intended that it operate as punishment. "Restitution would become a sentence that could, in and of itself, be imposed." 128 Cong. Rec. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum). "S. 2420 would . . . [p]ermit, for the first time, a Federal judge to order restitution as part of the sentence for crimes involving loss of property or personal injury . . . ." 128 Cong.

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[16] The successor statute currently provides that the court may order restitution "in addition to or, *in the case of a misdemeanor,* in lieu of any other penalty authorized by law." 18 U.S.C. § 3663(a), as amended by P.L. 99-646 § 20(a), 100 Stat. 3596 (Nov. 10, 1986) (emphasis added). This was an amendment of the successor statute after its enactment, but before its effective date of November 1, 1987. This amendment does not affect the case at bar.

Rec. S11436 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias). "It provides the remedy of restitution as a sentencing tool for judges . . . ." 128 Cong. Rec. 7431 (daily ed. April 22, 1982) (statement of Sen. Chiles).[17]

The punitive nature of a restitution order has also been recognized by this Court:

> Restitution is an effective rehabilitative penalty . . . . Such a penalty will affect the defendant differently than a traditional fine . . . . Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986) (state restitution order is penal in nature and therefore not subject to discharge in Chapter 7 bankruptcy proceedings). In *Kelly*, this Court endorsed the view of the bankruptcy judge who had noted that "the [restitution] obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." *Id.* at 52, quoting *In Re Pellegrino*, 42 B.R. 129, 133 (Bankr. D.Conn. 1984).

That restitution is penal in nature means not only that the court is limited to the statute, but also that, under the rule of lenity, any ambiguity in the statute must be resolved in Petitioner's favor. *Busic v. United States*, 446 U.S. 398, 407 (1980) (rule of lenity "one of the tools" used to construe an ambiguous penal statute). The rule of lenity applies not only to the substantive ambit of criminal proscriptions, but also to the penalties they impose.

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[17] *See* Project, Fordham L. Rev. at 534 & n.150, *supra* n.9 (collecting floor statements).

Bifulco v. United States, 447 U.S. 381, 387, 400 (1980) (rule of lenity precluded construing drug conspiracy statute to incorporate the special parole term of the target substantive offense).

Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the Congressional purpose is unclear. *Liparota v. United States*, 471 U.S. 419, 427 (1985). As this Court has explained in construing a substantive crime, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *see also McNally v. United States*, 483 U.S. 350, 359-60 (1987) (restrictive interpretation of the mail fraud statute); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985) (restrictive interpretation of the interstate transportation of stolen property statute). "Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971) (Congress must speak "plainly and unmistakably"); *see also Tanner v. United States*, 483 U.S. 107, 131 (1987) (restrictive interpretation of the federal conspiracy statute). Application of the rule of lenity in the context of Petitioner's case compels a holding that would restrict restitution to the amount involved in the offense of conviction.

C. A Narrow Construction Is Also Necessary to Avoid Constitutional Infirmities.

The Fifth Circuit's expansive construction creates constitutional issues in the implementation of restitution

under the VWPA where none need arise. To be sure, statutes should be construed to avoid constitutional questions, and "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575 (1988) (citing cases).

The Congress was fully aware of this danger when it enacted the 1986 clarifying amendment of § 3579(a)(1). The definitive House Report quoted in part II A 2 above (Pet. Br. 23) cited to another Committee Report from the previous year. That earlier report also took note of the question raised in the law journals as to the meaning of the phrase "victim of the offense," and answered that the phrase necessarily referred to the offense of conviction. The House Judiciary Committee's explanation was based upon clear language of the statute, reinforced by the need to avoid obvious constitutional infirmities:

> Any other interpretation would run afoul of the Constitution. Restitution under 18 U.S.C. § 3579 is a criminal penalty. To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law.

H.R. Rep. No. 1017, 98th Cong., 2d Sess., at 83 n.43 (1984).

In order to uphold the district court's restitution order under the unique facts of Petitioner's case, the court of appeals purported to apply the "related acts" and "significiant connection" tests enunciated in *United States v. Berrios*, 869 F.2d 25, 29 (2d Cir. 1989), and *United States v. Duncan*, 870 F.2d 1532, 1536 (10th Cir. 1989), yet it ignored their underlying rationale. In each of these cases, the courts took especial care to base the restitution order upon the defendant's undisputed criminal *conduct* in the first instance. Thus, though *Berrios* and *Duncan* may superficially appear to depart from the more traditional approaches to restitution described in other circuits, each court ultimately required the same sort of reliability in determining the defendant's actual criminal responsibility which the other circuits have found essential.

In this connection, it should be noted that *Berrios* was a split decision on the issue of the degree of restrictiveness of the statutory term "such offense." One judge filed a separate opinion to concur in the result, while sounding a cautionary note as to the implications of the holding:

> In my view, ordering restitution in an amount higher than the amount charged in the information is only proper where the higher amount is attributable to collateral consequences arising out of *the specific offense to which the defendant has pled guilty*. Where there are no such consequences, ordering restitution in the higher amount is an improper expansion of the court's sentencing power.

869 F.2d at 33 (emphasis added) (Meskill, Circuit Judge, concurring). Indeed, the majority opinion seems to rest upon a dual basis. While it enunciated a holding based upon the "related acts" test, the majority also set out in full the conduct of the defendant amounting to waiver, which was the sole basis for the concurring opinion.

Viewed from this perspective, the "significant connection" test enunciated in *Hughey* represents a radical

departure from accepted notions of criminal liability. Indeed, under *Hughey*, all that need be shown in support of a court's restitution order is that the other offenses involved: (1) the same defendant; (2) the same victim; and, (3) the same type of crime. 877 F.2d at 1261 (J.A. 97).

The problem with an order of restitution outside the count of conviction is that it permits a defendant to be held liable for criminal acts without due process of law, as occurred here, where Respondent attempted to establish Petitioner's collateral criminal conduct through hearsay. An order of restitution for collateral offenses also deprives a criminal defendant of his right to trial by jury on alleged criminal conduct.

As restitution is penal in nature, and may be ordered in lieu of any other punishment, it must function in the same manner and to the same extent as any other criminal sanction. Generally speaking, an ordinary criminal sentence is a specific punishment authorized for a specific offense. *See United States v. Henry*, 709 F.2d 298, 310 (5th Cir. 1983) (en banc) (plurality opinion). A criminal sentence may be imposed only after criminal liability has been established. Liability, of course, is established in one of two ways—by proof at trial where the Government has the burden on all of the elements beyond a reasonable doubt—or by a negotiated settlement of the case whereby the defendant expressly and affirmatively relieves the government of its constitutional burden of proof. In no other circumstances may a criminal sentence be imposed.

Likewise, restitution, which under the terms of the statute may be imposed in addition to or in lieu of any "other penalty," must be based in the absence of an

agreement upon a finding of guilt by proof at trial, or by the defendant's decision to expressly and affirmatively relieve the government of its burden. Unlike the *amount* of restitution which may be owed pursuant to a finding of guilt, the determination of criminal responsibility for the losses in the first instance must comport with traditional notions of due process.

In *Hughey*, the court of appeals dispensed with the essential predicate to any restitution order—the unequivocal determination of the defendant's criminal responsibility—when it ordered that he make restitution for all of MBank's losses although, in pleading guilty, Petitioner did not expressly and affirmatively relieve the government of its traditional burden except as to the count of conviction. The court of appeals, moreover, found that Petitioner was criminally responsible for MBank's additional losses by a preponderance of the evidence even though Petitioner never admitted and never agreed as part of the settlement of the case to relieve the government of its obligation to prove his guilt beyond a reasonable doubt.

III. THIS COURT NEED NOT RESOLVE THE SCOPE OF RESTITUTION FOR CONSPIRACIES OR SCHEMES, OR FOR ADMITTED COLLATERAL OFFENSES.

The circuit courts of appeals have found certain narrow exceptions to strict application of the "offense of conviction" limitation in the VWPA.[18] One group of cases

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[18] *See, e.g., United States v. Durham*, 755 F.2d 511, 512-13 (6th Cir. 1985) (the term "victim" is to be read liberally; the

(Continued on following page)

permits an order of restitution outside the offense of conviction where that offense is conspiracy, or has as an element a scheme to defraud.[19] Other cases permit such a restitution order where the defendant either admits, or at least does not dispute, collateral criminal conduct, or agrees to pay restitution for losses flowing from such conduct.[20] None of those exceptions are applicable to the case at bar. Furthermore, some of the decisions were rendered prior to the 1986 clarifying amendment to § 3579(a)(1), and none of the opinions reflect any awareness of the definitive 1985 House Report discussed in part II A 2 above (Pet. Br. 23).

In any event, the court below expressly rejected those limited expansion theories, 877 F.2d at 1262-64 (J.A. 99-105), and we have already shown that its broadly

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(Continued from previous page)

term "offense" is to be read narrowly); *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986) (uninterrupted series of events).

[19] *See United States v. Barnette*, 800 F.2d 1558, 1571-72 (11th Cir. 1986) (conspiracy); *United States v. Pomazi*, 851 F.2d 244, 249 (9th Cir. 1988) (by pleading to a scheme which is an element of the offense, a defendant may be ordered to make restitution for loss caused by entire scheme).

[20] *See United States v. Duncan*, 870 F.2d 1532, 1538 (10th Cir. 1989) (dispute went to the amount of loss, not defendant's responsibility for the loss); *United States v. Berrios*, 869 F.2d 25, 32 (2d Cir. 1989) (defendant acknowledged causing losses outside the count of conviction, as well as his obligation to pay them); *United States v. Kirkland*, 853 F.2d 1243, 1250 (5th Cir. 1988) (agreement to full restitution; no dispute as to type or amount of restitution); *United States v. Paul*, 783 F.2d 84, 87 (7th Cir. 1986) (admission to responsibility for restitution outside the count of conviction).

expansive rule is erroneous. But this Court need not, in this case, resolve the propriety of these narrower exceptions. That is so because none of the exceptions are even arguably applicable to this case. Here, the offense of conviction was the fraudulent use of a single credit card issued to Hershey Godfrey. (J.A. 10) The offense of conviction did not include, as an element, a scheme to defraud; nor was it a conspiracy encompassing other losses.

Moreover, Petitioner expressly disavowed any admission to collateral offenses at all pertinent points in the proceeding. (J.A. 11, 29, 46, 48) Likewise, Petitioner did not consent to an order of restitution in the amount entered. Petitioner suggested a compromise figure of $10,412, representing all losses incurred by MBank arising from misuse of the credit card described in the count of conviction. (J.A. 32, 35, 44, 47) The court declined Petitioner's suggestion and ordered restitution in the amount of $90,431, the sum representing all of MBank's losses resulting from the fraudulent use of a number of its credit cards. (J.A. 41-42, 56, 76) In upholding this order, the court of appeals resorted to an unparalleled extension of the law which represents a radical departure from accepted notions of criminal liability.

CONCLUSION

For the forgoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Title 18, United States Code, Sections 3579 and 3580.

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States in the manner provided for the collection of fines and penalties by section 3565 or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

(Added Pub.L. 97-291, § 5(a), Oct. 12, 1982, 96 Stat. 1253, and amended Pub.L. 98-596, § 9, Oct. 30, 1984, 98 Stat. 3138; Pub.L. 99-646, §§ 77(a), 78(a), 79(a), Nov. 10, 1986, 100 Stat. 3618, 3619.)

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of

such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal

civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(Added Pub.L. 97-291, § 5(a), Oct. 12, 1982, 96 Stat. 1255.)

99TH CONGRESS) HOUSE OF (REPORT
1st Session) REPRESENTATIVES (99-334

RESTITUTION AMENDMENTS ACT OF 1985

October 28, 1985. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2713]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2713) to amend title 18, United States Code, to modify certain provisions pertaining to restitution, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Restitution Amendments Act of 1985".

SEC. 2. POWER TO ORDER RESTITUTION IN LIEU OF OTHER SENTENCES.

(a) SECTION 3579 AMENDMENT.--Section 3579(a)(1) of title 18, United States Code, is amended by inserting ", in the case of any misdemeanor or a class E felony," after "in addition to or".

(b) SECTION 3556 AMENDMENT.—Section 3556 of title 18, United States Code, as amended by the Sentencing Reform Act of 1984, is amended by striking out "under this title" and all that follows through the end of such section and inserting in lieu thereof "may order restitution in accordance with sections 3663 and 3664.".

(c) EFFECTIVE DATE.--The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

SEC. 3. STANDARDS FOR IMPOSITION OF RESTITUTION.

(a) IN GENERAL.—Subsection (d) of section 3579 of title 18, United States Code, is amended to read as follows:

"(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the 30th day after the date of the enactment of this Act.

SEC. 4. STATEMENT OF REASONS RELATING TO RESTITUTION.

(a) IN GENERAL.—Section 3553(c) of title 18, United States Code, is amended by inserting "or the court orders only partial restitution," after "restitution,".

(b) CONFORMING AMENDMENT.--Section 3579(a) of title 18, United States Code, is amended—

(1) by striking out "(1)" where it appears after "(a)"; and

(2) by striking out paragraph (2).

(c) EFFECTIVE DATE.--The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

SEC. 5. ENFORCEMENT OF RESTITUTION ORDER.

(a) IN GENERAL.—Subsection (h) of section 3579 of title 18, United States Code, is amended by striking out "or" and inserting in lieu thereof "in the manner provided for the collection of fines and penalties by section 3565 or by".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the 30th day after the date of the enactment of this Act.

SEC. 6. CLARIFYING AMENDMENT.

(a) IN GENERAL.—Section 3579(a)(1) of title 18, United States Code, is amended by striking out "the offense" and inserting in lieu thereof "such offense".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 7. PRESENTENCE PROCEDURE RELATING TO RESTITUTION.

(a) IN GENERAL.—Section 3553(d) of title 18, United States Code, is amended—

(1) by striking out "OR RESTITUTION" in the subsection heading; and

(2) by striking out "or an order of restitution pursuant to section 3556,".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

SEC. 8. NEED FOR RESTITUTION TO BE CONSIDERED AS FACTOR IN SENTENCING.

(a) IN GENERAL.—Section 3553(a) of title 18, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (5);

(2) by striking out the period at the end of paragraph (6) and inserting "; and" in lieu thereof; and

(3) by adding at the end the following new paragraph:

"(7) the need to provide restitution to any victims of the offense.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

PURPOSES OF THE LEGISLATION

The purposes of the legislation are (1) to make technical amendments to the restitution provisions of current law and the Comprehensive Crime Control Act, and (2) to specify that restitution to victims is a purpose of sentencing.

BACKGROUND

The provisions of current federal law that authorize restitution as a separate criminal penalty—18 U.S.C. 3579 and 3580 – are rather new, having been signed into law in October 1982 as part of the Victim and Witness Protection Act of 1982.[1] The provisions were uncontroversial—indeed the vote in favor of the Victim and Witness Protection Act was unanimous in both Houses of Congress.[2]

In brief outline, sections 3579 and 3580 create a presumption in favor of restitution. They define the losses for which a convicted defendant can be ordered to make restitution and set forth procedures to be followed by the sentencing court when determining whether to order restitution. If the judge orders less than full restitution, they

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[1] Pub. L. No. 97-291, § 5, 96 Stat. 1253 (1982).

[2] *See* 128 CONG. REC. S-11439 (daily ed. Sept. 14, 1982) (Senate passage); 128 CONG. REC. H-8212 (daily ed. Sept. 30, 1982) (House passage of Senate bill with an amendment); 128 CONG. REC. S-13062 (daily ed. Oct. 1, 1982) (Senate concurs in House amendment with an amendment); 128 CONG. REC. H-8470 (daily ed. Oct. 1, 1982) (House concurs in Senate amendment to House amendment). For a brief synopsis of the legislative history of the Act, see H.R. REP. No. 1017, 98th Cong., 2d Sess. 78 n.11 (1984).

require the judge to state, on the record, the reasons why. The constitutionality of the provisions has been sustained by the six Courts of Appeals that have considered the issue.[3]

The Comprehensive Crime Control Act of 1984 reenacts sections 3579 and 3580, redesignating them as sections 3663 and 3664, respectively.[4] That Act also adds a new provision, section 3556, entitled "Order of restitution," which authorizes a court to order the defendant, "in addition to the sentence that is imposed pursuant to section 3551" (which authorizes imprisonment, fines, and probation), to make restitution to any victim of the offense "in accordance with sections 3663 and 3664."[5]

Rep. Frederick C. Boucher introduced H.R. 2198 to address a number of technical and other minor problems that have become apparent since the enactment of the Comprehensive Crime Control Act, and to make restitution to crime victims a stated purpose of sentencing in the

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[3] United States v. Palma, No. 84-5446 (3d Cir., decided April 16, 1985); United States v. Keith, No. 84-1134 (9th Cir., decided Feb. 12, 1985); United States v. Watchman, 749 F.2d 616 (10th Cir. 1984); United States v. Brown, 744 F.2d 905 (2d Cir. 1984); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984); United States v. Florence, 741 F.2d 1066 (8th Cir. 1984). *See* Note, *The Constitutionality of the Victims' Restitution Provisions of the Victim and Witness Protection Act*, 70 VA. L. REV. 1059 (1984).

[4] Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984). This change takes effect on November 1, 1986. *See id.* at § 235, 98 Stat. 2031 (1984).

[5] *Id.* at § 212(a)(2), 98 Stat. 1991 (1984). This new section takes effect on November 1, 1986. *See id.* at § 235, 98 Stat. 2031 (1984).

new sentencing system enacted by that Act. The Subcommittee on Criminal Justice asked the Department of Justice and the Judicial Conference of the United States for their views on the bill.

In response to this request, Judge Gerald Bard Tjoflat wrote that the Judicial Conference "would have no objections to enactment of this legislation," noting that the Conference had specifically recommended to the Justice Department two of the amendments in the bill. Acting Assistant Attorney General Phillip D. Brady wrote that the Justice Department "perceive[s] no problem" with the bill and "believe[s] that the bill will serve to resolve questions which have arisen during the course of litigation involving the [Victim and Witness Protection] Act."

The Subcommittee on Criminal Justice marked up H.R. 2198 on May 23, adopted one amendment, and ordered the bill as amended reported favorably in the form of a clean bill. H.R. 2713 is that clean bill. This Committee marked up H.R. 2713 on September 10, 1985, and reported it favorably with an amendment (which is explained in the section-by-section analysis).

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 of H.R. 2713 provides that the short title of the legislation is the "Restitution Amendments Act of 1985".

SECTION 2

Section 2 of H.R. 2713 deals with the power of the court to order restitution in lieu of any other criminal penalty. Current law,[6] which is carried forward by the Comprehensive Crime Control Act,[7] authorizes a Federal court to order restitution "in addition to or in lieu of" any other criminal penalty. The Comprehensive Crime Control Act, however, also adds a new provision, which only authorizes restitution "in addition to" another criminal penalty.[8] This new provision is silent about whether restitution may be ordered "in lieu of" other punishment. Thus, when the Sentencing Reform Act (chapter 2 of title II of the Comprehensive Crime Control Act) takes effect, there will be two provision [sic] purporting to define the situations in whch [sic] restitution can be imposed, and the two provisions are not identical.

Section 2(a) of H.R. 2713 as reported by the Subcommittee on Criminal Justice conformed the new provision of the Comprehensive Crime Control Act to current law and permitted a court, for any federal offense, to order restitution in lieu of any other criminal penalty. The Committee, however, considered that restitution alone would not be an appropriate sanction for very serious offenses and therefore amended section 2(a) to permit a court to

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[6] 18 U.S.C. 3579(a)(1).

[7] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1991 (1984) (redesignating 18 U.S.C. 3579(a)(1) as 18 U.S.C. 3663(a)(1)) (takes effect Nov. 1, 1986).

[8] Pub. Law No. 98-473, § 212(a)(2), 98 Stat. 1991 (1984) (enacting 18 U.S.C. 3556) (takes effect Nov. 1. 1986).

order restitution alone only for misdemeanors and felonies punishable by imprisonment for up to two years.

Section 2(b) of the bill provides that the amendment made by section 2(a) takes effect when section 212(a)(2) of the Sentencing Reform Act takes effect (November 1, 1986), since the problem addressed by section 2 will not arise until then.

SECTION 3

Section 3 of H.R. 2713 deals with matters that a court considers when deciding whether (and to what extent) to order restitution. Current law provides that a Federal court "shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process."[9] It could be argued that this provision, by using the term "shall", conflicts with another provision of current law, which provides that the court "may" order restitution.[10]

The origin of the former provision can be traced to the restitution provisions of the criminal code revision legislation. Segments of the business community objected to provisions in that legislation making restitution a

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[9] 18 U.S.C. 3579(d).

[10] 18 U.S.C. 3579(a)(1).

criminal penalty.[11] It was argued, inter alia, that restitution would complicate and prolong sentencing.[12]

The House and Senate Judiciary Committees responded to this concern about conservation of judicial resources by limiting the offenses for which restitution could be imposed and permitting the court to decline to impose restitution if to impose restitution would unduly complicate or prolong sentencing.[13]

This approach was carried forward in the Victim and Witness Protection Act of 1982, but with two modifications that make it more difficult to deny restitution in order to conserve judicial resources. First, the Act made it clear that restitution was not an all or nothing proposition. The sentencing court was empowered to award restitution to the extent that it could do so without unduly complicating or prolonging the sentencing process.[14]

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[11] *See Hearings on Revision of the Federal Criminal Code before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 609, 635-37, 682, 683, 693-99, 716-25, 837-39 (1979) (Business Roundtable); *Hearings on Reform of the Federal Criminal Laws before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 10077, 10091-92 (1979) (Business Roundtable).

[12] *See, e.g., Hearings on Revision of the Federal Criminal Code before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 698 (1978) ("The determination of the amount of the loss may well involve difficult questions of law and fact, which could only be fairly resolved by another full-fledged 'trial'.") (Business Roundtable).

[13] *See* H.R. Rep. No. 1396, 96th Cong., 2d Sess. 456-58 (1980); Sen. Rep. No. 553, 96th Cong., 2d Sess. 952-54 (1980).

[14] Pub. Law No. 97-291, § 5(a), 96 Stat. 1254 (1982) (enacting 18 U.S.C. 3579(d)). *See* 128 Cong. Rec. H-8469 (daily ed. Oct. 1, 1982) (remarks of Rep. Rodino).

Second, since the Act sought to make restitution the "expected norm, and no longer an afterthought,"[15] the sentencing court was directed, when considering conservation of judicial resources, to consider fairness to victims as well.

The use of "shall" in the provision addressing conservation of judicial resources, however, seems inconsistent with the section that provides that restitution "may" be ordered. Section 3(a) of H.R. 2713, therefore, strikes out "shall" and rephrases the conservation of judicial resources provision to require clearly that the need to provide restitution to victims must be weighed against conservation of judicial resources.

Section 3(b) of H.R. 2713 provides that this amendment is to take effect 30 days after the date of enactment of the Restitution Amendments Act of 1985. Because this ambiguity exists in current law, it would serve no useful purpose to delay this change beyond the minimum period of time needed by the bench and bar to become aware of the change.

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[15] 128 Cong. Rec. S-13063 (daily ed. Oct. 1, 1982) (remarks of Sen. Heinz). A Senate sponsor of the legislation, when the Senate was considering the House amendment to the Senate bill, even asserted that "It is the intent of Congress that judges order restitution in each and every case where the court finds there has been property loss or injury to the victim." *Id.* at S-13064 (daily ed. Oct. 1. 1982). While this assertion goes beyond the clear language of the Act (which permits a court to decline to order restitution even though there has been property loss or injury to a victim), the assertion does evidence a strong desire that restitution be the rule and not the exception.

SECTION 4

Current law requires that if a court declines to order restitution, or orders only partial restitution, the court must state, on the record, the reason why.[16] The Sentencing Reform Act carries forward this provision verbatim.[17] That Act, however, also enacts a provision, entitled "Statement of Reasons for Imposing a Sentence", that provides that, "If the sentence does not include an order of restitution, the court shall include in the statement [of reasons for imposing a sentence] the reason therefore."[18]

Because the language of the two provisions is not identical, there may be uncertainty about the obligation of the sentencing court. If a court orders partial restitution, one provision would require the court to state the reason why, but the other provision would not seem to.

Section 4(a) of H.R. 2713 adds language to the provision entitled "Statement of Reasons for Imposing a Sentence" to require the court to state reasons for ordering only partial restitution. Section 4(b) deletes language in the current law provision that is redundant in light of the amendment made by section 4(a). Section 4(c) of H.R. 2713 provides that the changes made by section 4 are to take effect on the date when section 212(a)(2) of the Comprehensive Crime Control Act takes effect (November 1, 1986), since that is when the problem will arise.

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[16] 18 U.S.C. 3579(a)(2).

[17] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579(a)(2) as 18 U.S.C. 3663(a)(2)) (takes effect Nov. 1, 1986).

[18] *Id.* at § 212(a)(2), 98 Stat. 1990 (1984) (enacting 18 U.S.C. 3553(c)) (takes effect Nov. 1, 1986).

SECTION 5

Section 5 of H.R. 2713 deals with enforcement of a restitution order. Current law authorizes the United States Attorney to enforce an order of restitution "in the same manner as a judgment in a civil action."[19] This provision, which is carried forward verbatim by the Sentencing Reform Act,[20] is similar to the current law provision that provides that a judgment imposing the payment of a fine "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases."[21] Thus, current law provides that fines and restitution orders be enforced by federal prosecutors in the same manner.

The Criminal Fine Enforcement Act, which was enacted last Congress, modified the manner in which criminal fines are enforced.[22] Section 5 of H.R. 2713 makes a conforming change in the provision governing the enforcement of restitution orders and authorizes the United States Attorney to enforce a restitution order "in the manner provided for the collection of fines . . . ." This will strengthen the ability of Federal prosecutors to enforce restitution orders.[23]

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[19] 18 U.S.C. 3579(h).

[20] Pub. Law. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579(h) as 18 U.S.C. 3663(h)) (takes effect Nov. 1, 1986).

[21] 18 U.S.C. 3565.

[22] Pub. Law No. 98-596, § 2, 98 Stat. 3134 (1984). *See* 130 CONG. REC. H-12266-67 (daily ed. Oct. 12, 1984) (remarks of Rep. Boucher).

[23] *See* H.R. REP. No. 906, 98th Cong., 2d Sess. 1 (1984) ("The purposes of the legislation are . . . to encourage the prompt and

(Continued on following page)

Section 5(b) of H.R. 2713 provides that the change made by section 5(a) takes effect 30 days after enactment of the Restitution Amendments Act of 1985. There is no reason to delay the effectiveness of this change beyond the minimum period of time needed by the bench and bar to become aware of the change.

SECTION 6

Current law provides that a Federal court, "when sentencing a defendant convicted of an offense [under title 18 and certain provisions of title 49] may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense."[24] This provision has been carried forward verbatim by the Comprehensive Crime Control Act.[25] It has been suggested that there is some ambiguity in the term "the offense" that appears in the phrase "victim of the offense."[26]

(Continued from previous page)

full payment of fines; and to improve the ability of the Federal Government to collect criminal fines when prompt or full payment is not forthcoming.").

[24] 24 U.S.C. 3579(a)(1).

[25] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579 as 18 U.S.C. 3663) (takes effect Nov. 1, 1986).

[26] *See* Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505 (1984); *Comment, Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 509-17 (1984). *But see* H.R. REP. No. 1017, 98th Cong., 2d Sess. 83, n. 43 (1984).

This suggestion is without substance. The term "the offense" in the phrase "victim of the offense," by ordinary rules of sentence construction, refers to the term "offense" in the antecedent phase in the same sentence, "convicted of an offense."[27] Thus, there is really no ambiguity about the meaning of the term "the offense" in the phrase "victim of the offense." That term means a victim of the offense for which the defendant has been convicted and is being sentenced. Nevertheless, a change in phraseology, even though unnecessary because it will not alter the meaning of the provision, can do no harm.

Section 6(a) of H.R. 2713, therefore, substitutes the term "such offense" for the term "the offense" in the phrase "victim of the offense." This change does not alter the meaning of the provision. Section 6(b) of H.R. 2713 provides that this change takes effect on the date of enactment of the Restitution Amendments Act of 1985. While ordinarily it is advisable to allow a lapse of time between the date of enactment and the effective date in order to enable the bench and bar to become aware of a change in law, no such delay is necessary in this issuance because this change in phraseology does not change the meaning of current law.

SECTION 7

Current law sets forth procedures that must be followed by a Federal court when deciding whether (and to

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[27] *See* H.R. REP. No. 1017, 98th Cong., 2d Sess. 83 n.43 (1984).

what extent) to order restitution.[28] These provisions have been carried forward without change by the Comprehensive Crime Control Act.[29] That Act, however, has another provision, which will take effect on November 1, 1986, that also sets forth procedures governing the issuance of an order of restitution.[30]

Thus, on November 1, 1986, two sets of provisions will describe procedures for issuing an order of restitution. This could result in litigation insofar as there may be discerned any difference between the two sets of provisions. Section 7(a) of H.R. 2713, therefore, amends the provision that will take effect on November 1, 1986, to strike out any reference to restitution. Section 7(b) of H.R. 2713 provides that this change is to take effect when section 212(a)(2) of the Comprehensive Crime Control Act takes effect (November 1, 1986), since that is the effective date of the provision being amended.

SECTION 8

Section 8 deals with the purposes of sentencing. The Comprehensive Crime Control Act enacts, effective November 1, 1986, a provision of title 18 of the United

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[28] 18 U.S.C. 3579, 3580.

[29] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579 and 3580 as 18 U.S.C. 3663 and 3664 respectively) (takes effect Nov. 1, 1986).

[30] *Id.* at § 212(a)(2), 98 Stat. 1990 (1984) (enacting 18 U.S.C. 3553(d)) (takes effect Nov. 1, 1986).

States Code that will set forth the factors that a sentencing court must consider when imposing sentence.[31] Several factors are listed, such as deterring criminal conduct, protecting the public, promoting respect for the law, and providing just punishment. Restitution to the victims of the offense is not listed.

Section 8(a) of H.R. 2713 amends this provision to require that a Federal judge, when imposing sentence, consider the restitution needs of the victims of the offense. Section 8(b) of H.R. 2713 provides that this change is to take effect when section 212(a)(2) of the Comprehensive Crime Control Act takes effect (November 1, 1986), since that is the date when the provision being amended takes effect.

Oversight Findings

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to this Committee by the Committee on Government Operations.

New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 2713 creates no new budget authority or increased tax expenditures for the Federal Government.

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[31] *Id.* at 98 Stat. 1989-90 (enacting 18 U.S.C. 3553(a)).

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no inflationary impact on prices or costs in the operation of the national economy.

Federal Advisory Committee Act of 1972

The Committee finds that this legislation does not create any new advisory committee within the meaning of the Federal Advisory Committee Act of 1972.

Statement Of The Congressional Budget Office

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 20, 1985.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 2713, the Restitution Amendments Act of 1985, as ordered reported by the House Committee on the Judiciary, September 10, 1985.

This bill amends title 18 of the United States Code, to modify certain provisions pertaining to restitution to victims of crime as part of the sentence imposed on offenders. Based on this review, we expect that no significant impact on the budgets of federal, state or local

governments would result from enactment of this legislation.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Rudolph G. Penner,
Director.

Cost Estimate

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office and estimates that the enactment of this legislation will not result in significant cost to the Federal Government.

Committee Vote

The Committee reported H.R. 2713 on September 10, 1985, by voice vote, a quorum of Members being present.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART II—CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 227—SENTENCES

* * * * * * *

SUBCHAPTER A—GENERAL PROVISIONS

* * * * * * *

§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) * * *

* * * * * * *

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; [and]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.] ; *and*

(7) the need to provide restitution to any victims of the offense.

* * * * * * *

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from the described.

If the sentence does not include an order of restitution, *or the court orders only partial restitution,* the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE [OR RESTITUTION].—Prior to imposing an order of notice pursuant to section 3555, [or an order of restitution pursuant to section 3556,] the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in an open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an o der.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

* * * * * * *

§ 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense [under this title, or an offense under section 902(h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.] *may order restitution in accordance with sections 3663 and 3664.*

* * * * * * *

CHAPTER 227—SENTENCE, JUDGMENT, AND EXECUTION

* * * * * * *

§ 3579. Order of restitution

(a)[(1)] The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, *in the case of any misdemeanor or a class E felony,* in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of [the] *such* offense.

[(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.]

* * * * * * *

[(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the

victim and the imposition of such order will not unduly complicate or prolong the sentencing process.]

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

* * * * * * *

(h) An order of restitution may be enforced by the United States [or] *in the manner provided for the collection of fines and penalties by section 3565 or by* a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

* * * * * * *

FOR ARGUMENT

No. 88-5081 (6)

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRASIEL L. HUGHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Victim and Witness Protection Act permits an order of restitution in an amount greater than the loss to the victim caused by the conduct underlying the offense of conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5691

FRASIEL L. HUGHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 86-110) is reported at 877 F.2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1989. The petition for a writ of certiorari was filed on September 25, 1989, and granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

At the time of petitioner's October 1985 offense, the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580 (1982), provided in part as follows: [1]

Section 3579. Order of restitution

(a) (1) The court, when sentencing a defendant convicted of an offense under this title * * * may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.[2]

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

* * * * *

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

* * * * *

[1] The full text of Sections 3579 and 3580 and other pertinent sections of the Victim and Witness Protection Act of 1982 in effect at the time of petitioner's offense are set forth in an appendix to this brief. Since the enactment of the restitution provisions on October 12, 1982—effective for offenses committed after January 1, 1983—numerous technical amendments have been made, including a renumbering of the provisions initially codified at 18 U.S.C. 3579, 3580, as 18 U.S.C. 3663, 3664, effective November 1, 1987. Pub. L. No. 97-291, § 5(a), 96 Stat. 1253, renumbered, Pub. L. No. 98-473, Tit. II, § 212(a)(1), 98 Stat. 1987. Like petitioner and the court below, we will refer to these sections as Sections 3579 and 3580.

[2] In his statement of the statutory provisions involved (Br. 2), petitioner includes a November 10, 1986 change in the statute, which substituted "such offense" for "the offense" as the last two words of Section 3579(a)(1). This change postdates petitioner's 1985 offense, but in any event the change does not affect the analysis in this case. See discussion, pp. 26-28, *infra*.

Section 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, * * * and such other factors as the court deems appropriate.

* * * * *

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

STATEMENT

1. Petitioner Frasiel L. Hughey was employed by the United States Postal Service in San Antonio, Texas. Between June and December 1985, petitioner and two coconspirators, Clarence Eugene Thompson and Thomas Edward Beatty, Jr., perpetrated a scheme to steal, distribute, and misuse credit cards that had been returned to the San Antonio post office as undelivered mail. J.A. 54-55. In connection with that scheme, a second superseding indictment returned in the Western District of Texas charged petitioner with three counts of theft by a postal employee, in violation of 18 U.S.C. 1709 (1982), and with three counts of use of unauthorized credit cards, in violation of 18 U.S.C. 1029(a)(2) (Supp. II

1984).[3] J.A. 3-6. Petitioner pleaded guilty to the fourth count of that indictment, which charged (J.A. 4-5):[4]

> That on or about October 18, 1985, in the Western District of Texas, and elsewhere, Defendant, did knowingly and with intent to defraud use an unauthorized access device, to-wit: MBank Mastercard Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Cosby, Texas 77532, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

On April 6, 1987, petitioner was sentenced to eight years' imprisonment,[5] and ordered to pay restitution to MBank USA in the amount of $90,431, to be paid within five years after the end of the term of imprisonment. That restitution was assessed "jointly and severally with

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[3] Petitioner was originally charged by criminal complaint with one count of use of an unauthorized credit card, in violation of 18 U.S.C. 1029(a)(2) (Supp. II 1984), and one count of theft by a postal employee, in violation of 18 U.S.C. 1709 (1982). He was initially indicted on the same counts. A first superseding indictment added two more counts under Section 1029(a)(2) and one additional count under Section 1709. Gov't C.A. Br. 3; 1 R. 121-123, 172-173, 182-184.

[4] The count conformed with the elements of 18 U.S.C. 1029(a)(2) (Supp. II 1984), which provides as follows:

> (a) Whoever—
>
> * * * *
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period; * * * * *
>
> shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

[5] The relevant sentencing provision of 18 U.S.C. 1029(c) (Supp. II 1984) provides for a fine of not more than $10,000 or twice the value obtained by the offense or imprisonment for not more than ten years, or both, for a first offense.

all other defendants related in this offense." J.A. 78.[6] The sentence was affirmed on appeal.

2. Petitioner's plea agreement (J.A. 7-8) did not mention restitution or any other aspect of sentencing. Petitioner agreed to plead guilty to one count of use of an unauthorized credit card; the government, for its part, agreed (a) to dismiss the remaining counts and previous indictments and complaint, and (b) not to prosecute petitioner "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." J.A. 7.

At his arraignment, petitioner was advised that "in addition to any term of imprisonment or fine imposed by the Court for the offense to which you are pleading guilty, you may be required to make restitution in the form of money for any property loss suffered by the victim as a result of this offense." J.A. 9. Admitting his guilt on the count to which he pleaded, petitioner specifically declined to acknowledge, respond, or admit to anything other than the facts pertaining to that count. J.A. 11.

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[6] Petitioner's co-conspirators, Thompson and Beatty, were separately charged. In a separate proceeding completed prior to petitioner's sentencing, co-conspirator Thompson pleaded guilty to one count of possession of stolen mail, in violation of 18 U.S.C. 1708 (1982), and was sentenced to five years' imprisonment and ordered to pay restitution to various financial institutions in the amount of $147,646.89, jointly and severally with restitution ordered against related defendants. Restitution to MBank USA was ordered in the amount of $144,887.22, restitution to Marine Midland Retail Credit was ordered in the amount of $1,420.70, and restitution to Government Employees Credit Union was ordered in the amount of $1,338.97. *United States* v. *Clarence Eugene Thompson*, No. SA-86-CR-163 (W.D. Tex. Dec. 8, 1986). In a separate proceeding completed after petitioner's sentencing, co-conspirator Beatty pleaded guilty to one count of use of an unauthorized credit card in violation of 18 U.S.C. 1029(a)(2) (Supp. II 1984), and was sentenced to eight years' imprisonment and ordered to pay $24,115.89 restitution. *United States* v. *Thomas Edward Beatty, Jr.*, No. SA-86-CR-84 (W.D. Tex. Sept. 4, 1987).

The government had evidence indicating that petitioner had stolen approximately 30 credit cards from the post office as part of his criminal scheme and that the losses to the issuing financial institutions from unauthorized use of those credit cards totalled $147,646.89;[7] as a result, this amount was initially proposed by the government as appropriate restitution. J.A. 12, 18, 21, 23. Petitioner thereupon filed a motion and memorandum interposing several objections. J.A. 12-20. He conceded restitution liability only for the single $1055.19 transaction that he understood to be the basis of the count to which he pleaded guilty. J.A. 13, 18. He argued that (1) the previously entered restitution order against his co-conspirator in the criminal scheme foreclosed a separate order of restitution against him; (2) his indigence rendered restitution inappropriate; (3) the scope of restitution sought by the government was unauthorized by the Victim and Witness Protection Act of 1982 (VWPA); (4) the government had failed to prove that he was responsible for the losses; and (5) compensation received by the issuing financial institutions from insurance or cardholder deductibles should be subtracted from any proposed restitution amount. J.A. 16-19.[8]

3. Prior to the sentencing hearing, the government decided to reduce its restitution request to encompass only losses sustained by MBank USA—the financial

[7] This amount involved petitioner's distribution or use of unauthorized credit cards issued by institutions other than MBank USA. See note 6, *supra*.

[8] Petitioner never argued, either before the district court or thereafter, that the government had breached the terms of his plea agreement, or that the agreement was invalid under Fed. R. Crim. P. 11 because, prior to acceptance of his plea, he was not properly informed, or was affirmatively misinformed, of his potential exposure for restitution. Rather, he consistently maintained that the restitution order was invalid for exceeding the amount authorized under the VWPA. See discussion at note 37, *infra*.

institution that issued the Godfrey credit card—as a result of petitioner's use of and trafficking in the stolen MBank credit cards. The court accepted into evidence a stipulation between the government and petitioner summarizing the testimony the government was prepared to offer to support the proposed restitution order. That stipulation identified 21 credit cards stolen by petitioner that were issued by MBank and listed the losses to MBank occasioned by the unauthorized use of each card—losses totalling $90,431. J.A. 53-57. Both in the stipulation itself and throughout the course of the sentencing proceeding, petitioner agreed that the stipulation, which was accepted in lieu of actual testimony, summarized the government's evidence bearing on his responsibility for the entire $90,431. However, he attacked the stipulated evidence as insufficient under the preponderance-of-evidence standard to demonstrate that his actions had given rise to that amount of loss J.A. 32-33, 71-72. Petitioner also stated that he was not admitting to any fact contained in the stipulation. J.A. 29, 57.

At the sentencing hearing, petitioner departed from his position that restitution liability extended only to the losses caused by a single credit card transaction. He suggested, as a compromise figure, that restitution be ordered for the total of $10,412 in losses to MBank caused by *all* misuses of the Godfrey credit card, thereby implicitly acknowledging his willingness to accept responsibility for these losses. J.A. 32, 47. In a subsequent written submission, petitioner recognized that his proposed restitution order of $10,412 extended "beyond the transaction of conviction," but defended it as lawful and appropriate under the circumstances. J.A. 68-69. After considering the stipulation, the parties' contentions, and information as to petitioner's financial status, the district court sentenced petitioner to pay MBank USA $90,431 within five years after the end of his eight-year term of imprisonment. J.A. 78.

4. Petitioner did not appeal from his conviction. Instead, he filed a motion under Fed. R. Crim. P. 35 to reduce and correct his sentence, arguing that the district court exceeded its authority under the VWPA in ordering restitution in any amount greater than the amount of loss caused by charges on the Godfrey credit card referred to in the sole count of the indictment to which he had pleaded guilty. J.A. 80-81. In denying that motion, J.A. 82-85, the district court ruled that it was authorized by the VWPA to order restitution "in excess of the amount indicated by the count to which the guilty plea was entered." J.A. 83. The court found that the stipulation of testimony was sufficient to show by a preponderance of the evidence that MBank suffered $90,431 in losses by virtue of petitioner's theft and distribution of various MBank credit cards. *Ibid.* The court also ruled that, to the extent its restitution authority might be limited to losses resulting from a single criminal scheme involving the count to which petitioner pleaded guilty, all losses encompassed by the restitution order were the result of such a scheme. J.A. 84.[9]

5. On appeal, the Court of Appeals for the Fifth Circuit affirmed. J.A. 86-110. The court interpreted the VWPA to permit restitution for losses caused by petitioner's entire course of trafficking and use of unauthorized MBank credit cards. It adopted the view that the VWPA permits a sentencing court to require restitution

[9] The court also rejected petitioner's argument that an order of restitution imposed on him was precluded by the prior order imposed on his co-conspirator Thompson. The court held that, although the VWPA (Section 3579(e)) foreclosed double recovery by MBank, it did not preclude "joint and several" restitution orders. J.A. 84. Finally, the district court rejected petitioner's argument that his indigence precluded the restitution order. The court stated that it had considered petitioner's financial situation as required by the VWPA (Section 3580(a)), but that petitioner's indigence at the time of sentencing did not preclude the order for restitution. J.A. 84-85.

beyond the count of conviction when a significant connection exists between the crime of conviction and similar acts causing losses to the victim. J.A. 97-100. The court found support for this holding in the text, legislative history, and purposes of the restitution provisions of the VWPA, as well as in decisions of other courts of appeals. The court observed that the meaning of the term "offense" in Section 3579(a)(1) of the VWPA, which authorizes courts to order restitution to any "victim of the offense," was "ambiguous." The court concluded that by directing courts, "in determining the amount of * * * restitution," to consider "such other factors as the court deems appropriate," 18 U.S.C. 3580 (a) (1982), Congress had "obviously give[n] a sentencing court some discretion in determining the proper restitutive amount." J.A. 93.[10] The court contrasted the VWPA's language with the more "limiting language" (J.A. 94) of the previously enacted Federal Probation Act (FPA), 18 U.S.C. 3651 (1982), which provided that a defendant, as a condition of probation, could be required to make restitution "to aggrieved parties for . . . loss *caused by the offense for which conviction was had.*" See J.A. 94 (quoting 18 U.S.C. 3651 (1982)). After reviewing the holdings of some courts of appeals that interpreted the FPA as limiting restitution to the amount attributable to the offense of conviction, the court stated (J.A. 95):

[10] The court also found support for the government's view in the language of Section 3580(e), which provides that a conviction of a defendant "for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense" in subsequent civil proceedings by the victim. The court reasoned that, "if Congress had intended to limit the amount of restitution to that attributable to the offense of conviction, subsection (e) would not have needed to employ the phrase 'for an offense involving the act giving rise to restitution' but instead could have simply stated 'for an offense giving rise to restitution.'" J.A. 94. The phrase "involving the act" was "useless surplusage" under petitioner's limited reading of the statute. *Ibid.*

> Congress must have been aware that such a limitation was placed on the FPA by some courts. Given the absence of any limiting language in the VWPA, it is reasonable to infer that Congress did not intend to limit victim compensation to the amount specified in the indictment.

The court also pointed to legislative history indicating that Congress designed the Act to ensure that wrongdoers "make their victims whole." See J.A. 95-96 (citing S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982)). Congress's generous compensatory purposes would be frustrated, the court asserted, by a rule that tied the amount of restitution to "a prosecutor's decision regarding the number of counts with which to charge a defendant," which is ordinarily controlled by factors having "little or nothing" to do with the objective of victim compensation. J.A. 96. In addition, the court observed that "given the high levels of plea bargaining within our criminal system," a rule limiting restitution under the VWPA to the count of conviction would mean that "in the majority of cases a victim could not be made whole." *Ibid.* In light of Congress's "stated intent of providing for the full restitution of victims," the court concluded, the statute should not be interpreted so as to be "rendered substantially nugatory through plea bargaining." J.A. 96-97.

The court of appeals disagreed with petitioner's contention that the district court had imposed "criminal responsibility" for all conduct that formed the basis of the restitution order, and had done so without making the necessary finding of proof beyond a reasonable doubt. J.A. 105-107. The restitution order was, rather, a penalty for the offense to which petitioner pleaded guilty: it did not constitute an independent assessment of petitioner's criminal liability for other offenses. The statutory standard of proof by a preponderance of the evidence (Section 3580(d)), which was appropriate to the determination of both the fact and amount of injury

underlying the restitution order, was met in this case. Finally, the court held that petitioner had been afforded all appropriate procedural steps leading to the restitution order and was not unfairly surprised as to the scope of restitution.[11]

SUMMARY OF ARGUMENT

1. The Victim and Witness Protection Act requires that an order of restitution be limited to losses suffered by a victim of the offense of conviction, but it does not limit the amount of the order to the losses caused by the specific conduct that is the basis of the offense of conviction.

a. None of the statutory language relied on by the petitioner imposes such a limitation. To the contrary, the Act clearly leaves room for the court, in fixing the penalty of restitution, to consider other losses suffered by the victim as a result of the defendant's conduct. Indeed, the statute as a whole evinces an inclusive, flexible approach to restitution orders that places a high priority on full and fair compensation to the victim for the harm done by the defendant. A strict "offense of conviction" standard would seriously undermine this approach, especially in the context of a system, like ours, in which plea bargaining plays an important role in the administration of criminal justice.

b. The existence of judicial discretion to look beyond the offense of conviction in ordering restitution is supported not only by the text of the VWPA but by two important aspects of the background against which the statute was enacted. First, such discretion is fully consistent with the common law understanding of restitution as a penal sanction and with the traditional scope

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[11] The court of appeals also rejected petitioner's argument that the sentencing court had not properly assessed his indigence and had not given adequate consideration to petitioner's proposed "compromise" figure. J.A. 107-110.

of penal restitution orders. Second, discretion in shaping the scope of restitution is simply an instance of the customary authority of sentencing judges to look to facts outside the particular offense of conviction in fixing the terms of a sentence.

c. In determining whether a particular order of restitution represents a permissible exercise of the trial court's sentencing discretion, the lower courts have properly looked to a number of factors that bear on both fairness to the victim and the penological purposes of restitution. In the present case, given the close relation between the offense of conviction and the other conduct that furnished a basis for the order, as well as the existence of a common victim and a common scheme, the restitution order did not constitute an abuse of the district court's discretion.

2. Nor did the restitution order violate any of petitioner's constitutional rights. Since the restitution authorized by the VWPA is in the nature of a criminal penalty, the Seventh Amendment guarantee of jury trials in civil cases has no application. And since the restitution order is an aspect of the sentence imposed for the crime of which petitioner was convicted, and not a separate criminal proceeding, the Sixth Amendment guarantee of jury trial is similarly inapplicable. Moreover, the procedural protections provided in the Federal Rules of Criminal Procedure, and in the VWPA itself, are more than adequate to satisfy the demands of due process.

ARGUMENT

I. THE VICTIM AND WITNESS PROTECTION ACT AUTHORIZES AN ORDER OF RESTITUTION IN AN AMOUNT IN EXCESS OF THE LOSS TO THE VICTIM CAUSED BY THE OFFENSE OF CONVICTION

The question in this case is whether the VWPA permits judges to sentence an offender to pay restitution to a victim of the offense in excess of the amount attributable to the acts underlying the count on which he is convicted—which we refer to as the "offense of conviction." In our view, the court of appeals was correct in concluding that such a sentence may lawfully be imposed. An order of restitution under the VWPA unquestionably is a criminal penalty. See pp. 42-43, *infra*. The text and history of the VWPA, buttressed by the background understanding of the nature and scope of restitution authority, strongly support restitution orders that extend beyond the offense of conviction, and that advance accepted penological objectives and the goal of fair compensation of victims.

No aspect of the VWPA imposes a limitation on the scope of permissible penal restitution that would call into question the validity of the restitution order in this case. Section 3579(a)(1) provides that "when sentencing a defendant convicted of an offense," the court may order "that the defendant make restitution to any victim of the offense." As petitioner acknowledges, the language of that Section "unambiguously answers two questions." Pet. Br. 14. First, the term "offense," as used in that section, means the offense for which the defendant is convicted and is being sentenced—in this case, the offense of a single unauthorized use of a credit card issued by MBank. In authorizing an order of restitution when a court sentences a defendant "convicted of an offense," Section 3579(a)(1) indicates that the term "offense" refers to the actual offense for which the defendant was convicted. Second, the meaning of the

term "offense" as used in the phrase "convicted of an offense," is the same as its meaning in the phrase "victim of the offense" in the same section. Therefore, "victim of the offense" identifies one who suffers a loss from the conduct underlying defendant's conviction, and Section 3579(a)(1) authorizes an order of restitution only to such a victim. In this case, MBank is unquestionably a victim of the "offense of conviction"—the single use of the Godfrey credit card "on or about October 18," to which petitioner pleaded guilty in the fourth count of the indictment.[12] But identifying MBank as a "victim of the offense" no more defines the extent of permissible restitution than does identifying petitioner as the "defendant" who may be ordered to pay.

Petitioner goes to extraordinary lengths (Br. 13-19) to persuade the Court that the word "offense" in Section 3579(a) refers to the offense of conviction for which he was sentenced. We are in complete agreement: in this case, the term "offense" in Section 3579(a) refers solely to the violation of 18 U.S.C. 1029(a)(2) (Supp. II 1984) which was charged in the fourth count of the indictment and of which petitioner was convicted. We part company with petitioner, however, in his endeavor to show that a limited meaning of the word "offense" restricts the extent of restitution to the losses directly caused by the offense of conviction.

Indeed, petitioner acknowledges (Br. 15) that the language of Section 3579(a)(1) does not resolve the question of *how much* restitution a defendant may be ordered

[12] We agree with petitioner, see Pet. Br. 15 n.4, that this case does not present the related question of who may qualify as a proper victim of the "offense of conviction," since MBank was unquestionably the victim of the offense to which petitioner pleaded guilty, and MBank suffered the entire loss represented by the total amount of restitution ordered by the judge.

Nor does this case present the question of defining the victim or victims of the offense where a defendant is convicted (by plea or otherwise) of a count charging a conspiracy or scheme encompassing a course of conduct.

to pay to a victim of the offense of conviction. Section 3579(a)(1) supplies a principle of identification, but sets no further limit on an award: it is silent concerning a method for calculating the amount, the factors that might bear on the magnitude of the penalty, or the judge's discretion to consider conduct or circumstances beyond the strict limits of the statutory offense.

Contrary to petitioner's contentions (Br. 15-17), Sections 3580(a) and (d) similarly do not limit the amount of restitution to the loss to the victim occasioned solely by the offense of conviction. As we shall show, these provisions clearly leave room for the court, in fixing the penalty of restitution, to consider other losses suffered by the victim as a result of the defendant's conduct. Such discretion is consistent with other sections of the statute, which unequivocally express Congress's intent to provide victims with full and fair compensation for all losses caused by a defendant's conduct. The language of various sections of the VWPA evince Congress's desire to remove artificial limitations on restitution by permitting sentencing judges to exercise their customary discretion to consider the totality of circumstances—including the defendant's *entire* course of conduct—subject only to constitutional limits and the demands of judicial efficiency. An examination of the nature and underlying penological objectives of restitution as a criminal penalty, and of the state law understanding of restitution, strengthens the conclusion that the VWPA permits courts to order restitution for losses to the victim that were caused by conduct outside the specific offense of conviction.

A. The Language and Structure of the VWPA Do Not Limit Restitution to Losses Flowing From Conduct Underlying the Offense of Conviction

1. Apart from Section 3579(a)(1), which authorizes the court to order restitution to "any victim of the offense," the Act contains several other sections that bear on the question of *how much* restitution may be ordered in a particular case. None of these provisions limits the

restitution order to the losses flowing from the offense of conviction. On the contrary, the language of the provisions dealing with restitution, taken as a whole, supports the existence of a broad authority to order restitution beyond the particular count of conviction.

Petitioner claims to find the "unambiguous answer" to the question "how much" in Sections 3580(a) and (d) of the statute. But these provisions place no fixed limit on the scope of an order of restitution. Section 3580(a) states:

> The court, in determining * * * the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense.

And Section 3580(d) states that disputes as to the "amount or type of restitution" shall be resolved by a preponderance of the evidence, and that the government shall bear the burden of "demonstrating the amount of the loss sustained by the victim as a result of the offense." As petitioner points out (Br. 16), the loss "resulting from the offense"—that is, from the actual offense of conviction—is only one element of the restitution calculus. Section 3580(a) also directs the court to take into account "such other factors as the court deems appropriate." 18 U.S.C. 3580(a). And similarly, Section 3580(d) provides that the "burden of demonstrating such other matters as the court deems appropriate"—that is, matters other than the loss resulting from the offense itself—"shall be upon the party designated by the court as justice requires."

Thus, in authorizing restitution orders under the VWPA, Congress made provision for judicial consideration of "other factors" and "other matters." Congress nowhere precluded consideration of the defendant's conduct surrounding the offense of conviction as an additional factor that might make a larger restitution order appropriate.[13]

[13] While Section 3580(a) allows the court to consider all "appropriate" factors in shaping an order, a number of provisions of Section 3579 do operate to define the scope of the court's discretion. As already noted, Section 3579(a) limits restitution orders to the victim of the offense of conviction. Section 3579(b) specifies the kinds of loss for which the order can compensate in the case of damage to property or personal injury. (The language of this subsection, which refers to an "offense resulting in" property damage or personal injury, cannot be read to limit all restitutionary authority to the offense of conviction, since the clear purpose of the subsection is, as indicated, to spell out the kinds of harms that can be the subject of a restitution order, *e.g.*, costs of professional services, loss of income, value of property, etc. See S. Rep. No. 532, 97th Cong., 2d Sess. 31-32 (1982).) In addition, the formulation of a restitution order may not unduly complicate or prolong the sentencing process (Section 3579(d)); the victim may not receive double recovery on account of restitution (Section 3579(e)); and the order may not impose a payment obligation beyond a specified period of time (Section 3579(f)).

2. Expressions of congressional preference for flexibility and generosity in providing for restitution are found throughout the statute.[14]

a. As is evident from the statement of findings and purposes of the VWPA (see 18 U.S.C. 1512 note, § 2(a) and (b) (1982) (App., *infra*, 5a-6a)), Congress sought through the VWPA to ameliorate the unresponsiveness of the criminal justice system to the interests and needs of the victim. Congress declared that "the Federal Government * * * has an important leadership role to assume in ensuring that victims of crime * * * are given proper treatment by agencies administering the criminal justice system." VWPA Section 2(a)(3). Through the VWPA, Congress sought "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims * * * of crime without infringing on the constitutional rights of the de-

[14] In support of his reading of the statute, petitioner seeks refuge in the rule of lenity. Br. 23-24. See, *e.g.*, *Crandon* v. *United States*, No. 88-931 (Feb. 27, 1990), slip op. 15. As petitioner recognizes (Br. 24), however, that canon of statutory construction is not applicable where, as here, the statute expressly or by implication makes the intent of Congress sufficiently clear. See *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981).

fendant." VWPA Section 2(b)(2). There is no substantial argument that petitioner's constitutional rights would be impaired by a common sense interpretation giving all provisions of Section 3580(a) and (d) their full effect. The existence of discretion to look beyond the offense of conviction in ordering restitution under appropriate circumstances—and with appropriate procedural safeguards—comports with well-established sentencing practice, and presents no constitutional difficulties. See pp. 36-38 and 41-46, *infra*.

b. Yet another provision of the VWPA expresses Congress's expectation that a broad range of information would be considered by the sentencing court in determining the type and amount of restitution. Section 3 of the statute enacted new provisions of Fed. R. Crim. P. 32(c)(2)(C) and (D), which enumerated information to be included in the presentence report. The report was to contain "(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and (D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense." The evident purpose of this requirement for the sentencing court was to permit the formulation of an appropriate order of restitution. The sweeping language of the rule is notable for the absence of any indication that information to be gathered should pertain only to losses resulting from the offense of conviction.[15] The rule focuses on the victim's "restitution

[15] As part of its substantial revision of federal sentencing procedures in the Sentencing Reform Act of 1984, Congress replaced the VWPA provisions of Rule 32(c)(2)(C) and (D) with new provisions (D) and (F), which now require the presentence report to contain "verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed" and "such other information as may be required by the court." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 215(a), 93 Stat. 2014. There is no indication that any substantive change was intended by this modification.

needs" and the multiple types of harms actually suffered by a "victim of the offense." It does not restrict the source of that harm, and is devoid of any directive to disregard the realities of the defendant's actual conduct toward the victim.

c. The inclusive and flexible approach to victim welfare that finds expression in the contemporaneously enacted provisions governing the presentence report is also evident in Section 3579(d) of the VWPA itself, which stated that the court "shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process."[16] Thus, Section 3579(d) required the court, in fashioning a restitution order, to give priority to "fair[ness] * * * to the victim,"[17] subject only to the interest

[16] Effective December 10, 1986, Section 3579(d) was modified to provide as follows:

> To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 77(a), 100 Stat. 3618; see 18 U.S.C. 3579(d) (Supp. IV 1986). The balance required by this version of the provision is not significantly different from that required by the initially enacted version of the VWPA.

[17] The statement of findings and purposes enacted in Section 2 of the VWPA sheds additional light on one aspect of what Congress meant by "fair[ness] * * * to the victim." Congress found that "victims * * * are either ignored by the criminal justice system or simply used as tools to identify and punish offenders. * * * All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim." VWPA Section 2(a)(1) and (2).

in forestalling undue complication or prolongation of the sentencing process. Together with Section 2(b) of the statement of findings and purposes, discussed above, this provision establishes that the maximization of compensation for the victim's losses shall be limited only by the defendant's rights under the Constitution and the need to avoid undue cost and delay.[18]

d. A strict "offense of conviction" limitation on orders of restitution cannot be reconciled with the statutory objective of fairness to victims. Such a narrow reading would routinely result in victim undercompensation because the scope of the authority to order restitution would depend on prosecutorial decisions that are not based on the victim's interests or on the actual damage to the victim caused by conduct of the defendant. The observations of the Tenth Circuit in *United States* v. *Hill*, 798 F.2d 402, 405 (1986), are particularly illuminating. In deciding that limiting a victim's recovery under the VWPA to the amount charged in the count of

[18] The legislative history of the VWPA is fully consistent with the textual evidence that the Act provides a broad scope to the courts' authority to order restitution. Thus, in describing the compromise provision governing restitution, the section-by-section analysis declared: "The goal of the legislation is to ensure that Federal crime victims receive the fullest possible restitution from criminal wrongdoers." 128 Cong. Rec. 27,391 (1982). See also 128 Cong. Rec. 26,811 (1982) (statement of Sen. Laxalt commenting on the compromise bill) ("The purpose of this bill is to attempt to make the victim whole once again."). Similar statements of purpose were made in reference to both S. 2420, 97th Cong., 2d Sess. (1982) and H.R. 7191, 97th Cong., 2d Sess. (1982)—the proposed Senate and House versions—before the compromise version developed. See S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982) ("The premise of the [restitution] section is that the court in devising just sanctions for adjudicated offenders[] should insure that the wrongdoer make goods [*sic*], to the degree possible, the harm he has caused his victim."); 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino) ("One of the purposes of the Federal criminal justice system should be to make the victim financially whole. The person who should be responsible for doing this is the wrongdoer, the person who caused the loss. For this reason alone, the courts should order restitution whenever possible.").

conviction was "unwarranted given the compensatory objectives of the VWPA," the court observed:

> The decision of a prosecutor to indict a defendant and the manner in which a defendant is indicted have little, if anything, to do with objectives of the VWPA. For instance, a prosecutor's decision to charge a defendant for one or more counts of an offense is discretionary, and that discretion is exercised by taking into consideration law enforcement objectives which have nothing to do with the congressional objective of compensating crime victims. The decision to specify an amount in the indictment is also often solely for the purpose of satisfying jurisdictional requirements.

The exigencies of the criminal justice system, rather than careful regard for the well-being of victims, tend to drive such prosecutorial decisions as how to charge an offender or structure an indictment. Prosecutors may specify only a fraction of the conduct that could form the basis of criminal charges in order to accommodate the technical definitions of criminal code offenses, ensure the fulfillment of jurisdictional requirements for criminal liability, minimize the difficulty of proving a charge, or avoid distracting juries with too many facts or multiple counts.

This case illustrates some of these principles. The six counts of the second superseding indictment were based on only a portion of the unlawful conduct—even though the government possessed substantial evidence that petitioner's misfeasance was far more extensive. Compare J.A. 3-6 (second superseding indictment) with J.A. 53-57 (stipulation of testimony for sentencing). And the fourth count of the indictment, which charged only one among several unauthorized uses of the Godfrey credit card, was clearly structured to ensure technical compliance with the elements of 18 U.S.C. 1029(a)(2) (Supp. II 1984) (which requires a gain from the transaction(s) of $1,000 or more), and to simplify the task of proof. In attending to these priorities, however, the

interests of MBank in receiving full compensation for petitioner's credit card fraud were inevitably slighted.

In cases such as this, where the defendant engaged in an overall scheme involving small, individual acts of criminal fraud, the sacrifices of victims' interests that would result from petitioner's crabbed construction of the VWPA is manifest. To insure full restitution even to a single victim, the government would often be required to charge many counts, and to prove each beyond a reasonable doubt. Congress could not have intended to condition full and fair restitution on such drastic changes in prosecutorial practice.

In addition, as the Second Circuit stated in *United States* v. *Berrios*, 869 F.2d 25, 30 (1989), "the fact that the vast majority of criminal cases are concluded by plea bargains" further intensifies "[t]he apparent conflict between Congress's expressed intent [in the VWPA] that crime victims be compensated to the maximum extent possible and the proposition that the charge on which the defendant is convicted establishes the maximum restitution that may be ordered." Plea bargaining is "an essential component of the administration of justice," *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), and accounts for the overwhelming majority of criminal convictions. See *United States* v. *Berrios*, 869 F.2d at 30 (citing Fed. R. Crim. P. 11 advisory committee note (1974 Amendment) (1968 study estimating that guilty pleas "account for the disposition of as many as 95% of all criminal cases")).

A restrictive view of a court's authority to order restitution would have two untenable consequences for a system in which plea bargaining is the principal method for dealing with criminal conduct. First, the prosecutor would be put to a hard choice—one clearly not intended by the VWPA—of going to trial on a larger number of counts or sacrificing the interests of victims. Second, petitioner's rule would shrink any incentive the defendant might have to plead guilty to a particular charge, since it would eliminate the defendant's hope of persuading the

judge to reduce the term of incarceration on that charge by promising to make broad restitution for the "real offense." Cf. *United States* v. *Hawthorne*, 806 F.2d 493, 499-500 (3d Cir. 1986) (noting that the degree to which restitution was available likely influenced the district court to give a lighter sentence); *United States* v. *Berrios*, 869 F.2d at 33 (same); *United States* v. *Spambanato*, 876 F.2d 5, 7 (2d Cir. 1989) ("as in *Berrios*, the expressed willingness to make full restitution clearly was intended to influence and did in fact influence the court to be more lenient in sentencing"). In structuring the terms of plea bargains, prosecutors would have less scope to exercise their judgment that victim restitution (as opposed to a prison term) would best serve society's interests.

3. The danger that an "offense of conviction" limitation would undermine the goal of full and fair victim compensation is starkly revealed by the attempts of the courts of appeals, under the Federal Probation Act (FPA), to avoid the unpalatable consequences of the limitation in a system dominated by plea bargaining. Since 1925, the federal courts have had authority to impose restitution as a condition of probation. See Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259.[19] The FPA, in sharp contrast to the VWPA, provided that a court could order the defendant "to make restitution or reparation to aggrieved parties for actual damages or loss *caused by the offense for which conviction*

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[19] The Federal Probation Act (Act of June 25, 1948, ch. 645, 62 Stat. 842, as amended and codified at 18 U.S.C. 3651 (1982)), provided the statutory authority for such orders of restitution until its repeal, effective for offenses committed after November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(1) and (2), 235, 98 Stat. 1987, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, 4, 99 Stat. 1728. Whether or not the FPA was wholly superseded by the VWPA prior to 1987, the present case is not governed by the FPA because petitioner was not ordered to make restitution as a condition of probation.

was had." 18 U.S.C. 3651 (1982) (emphasis added). Although the courts of appeals were in general agreement that a restriction on the extent of restitution flowed from that particular statutory language, the cases were split on the extent and nature of that limitation. One line of cases maintained that the FPA limited the scope of restitution to the conduct inherent in the offense of conviction. See, *e.g.*, *Karrell* v. *United States*, 181 F.2d 981 (9th Cir.), cert. denied, 340 U.S. 891 (1950); *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983). However, without pointing to a clear statutory basis, another line of decisions recognized an exception, commonly arising in the plea bargain situation, in which the defendant agreed to make restitution for the greater amount as a condition of his plea, or admitted at some point in the proceedings that he was responsible for losses caused by conduct outside the offense of conviction. See, *e.g.*, *United States* v. *Orr*, 691 F.2d 431 (9th Cir. 1982); *United States* v. *McMichael*, 699 F.2d 193 (4th Cir. 1983).[20] See also Slavin & Sorin, *Congress Opens a Pandora's Box—Restitution Provisions of the Victim and Witness Protection Act of*

[20] Yet another line of cases construed the FPA as imposing a limitation only on the independent fact-finding authority of the sentencing court. Unlike the VWPA, the FPA did not explicitly provide for judicial determination of harm to the victim and did not contain provisions allocating the burden of proof or setting the standard of proof of losses resulting from the defendant's actions. Cf. 18 U.S.C. 3580(d). In addition, not until 1983 was Fed. R. Civ. P. 32(c) amended to require the collection of information relating to harm to the victim as part of the presentence report.

In the absence of fact-finding authorization under the FPA, these courts held that the sentencing judge was precluded from determining the total losses caused by defendant's conduct as an aspect of the sentencing hearing; but if such losses had been established at trial, by plea, or in some other forum, then a restitution order under the FPA could extend to conduct beyond the offense of conviction. See, *e.g.*, *United States* v. *Gering*, 716 F.2d 615, 625 (9th Cir. 1983); *United States* v. *Landay*, 513 F.2d 306 (5th Cir. 1975).

1982, 52 Fordham L. Rev. 507, 512 (1984) (reviewing "judicially-created exceptions to the restrictive approach" under the FPA). By creating an exception for admissions" or fully bargained pleas, these courts avoided circumscribing judicial authority to order restitution in cases where procedural difficulties of fact-finding and proof were minimized by the defendant's admission (see note 20, *supra*), and the unfairness and inflexibility of the "offense of conviction" rule were thus most apparent.

Because the more permissive language of the VWPA has generally been construed to permit restitutionary orders that account for losses beyond the offense of conviction, as yet the courts of appeals have had no occasion to determine the issue whether such an exception exists under the Act.[21] In this very case petitioner, at his sentencing hearing, indicated a willingness to accept responsibility for losses beyond those caused by the offense of conviction; thus, if the courts below had adopted an offense of conviction standard, they might have had to confront that issue.

In our view, the VWPA no more supports an "admissions exception" than it does an "offense of conviction" standard to which such an exception would apply. Rather, the statute grants discretionary authority applicable in *all* cases where responsibility for the victim's losses is established—whether through the defendant's own admission, or through judicial factfinding.[22] By

[21] See cases cited at pp. 39-40, *infra*; but see *United States* v. *Berrios*, 869 F.2d at 32 (noting defendant's expressed willingness to make full restitution); *United States* v. *Spambanato*, 876 F.2d at 7 (same); *United States* v. *Paul*, 783 F.2d 84, 88 (7th Cir. 1986) (restitution proper as to amount of loss defendant "admitted to having caused"). See also *United States* v. *Kirkland*, 853 F.2d 1243, 1251 (5th Cir. 1988) (implying that agreement to make restitution beyond counts of conviction was part of "detailed plea negotiations").

[22] As suggested below, however, pp. 39-41, a court in the exercise of its discretion to consider "appropriate factors," might take the existence of the defendant's admission into account as bearing on both the fairness to the victim and the penological value of an

creating an elaborate factfinding procedure and prescribing a standard of proof of injury, Congress has decided that the only necessary predicate for a full order of restitution—where such restitution would be "appropriate"—is a finding by a preponderance of the evidence that the loss sustained by the victim was the result of a defendant's actions. It is not for the judiciary to strike a different balance by reading the VWPA to permit a broader restitution order *only* when the basis for such an order is supplied by the defendant's own admission or agreement.[23]

4. In 1986, as part of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 79(a), 100 Stat. 3619, Congress changed the term "victim of the offense" in Section 3579(a) to read "victim of such offense." As we have noted, see note 2, *supra*, the substantive sentencing provision in effect on the date of petitioner's October 1985 offense governs this

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order of restitution that encompasses losses to the victim from the admitted conduct.

[23] Plea bargains have a dual character. Cf. *Santobello* v. *New York*, 404 U.S. at 261-262. To the extent they are contractual agreements between the prosecutor and the accused, the limitations on a judge's sentencing authority to order restitution would not limit the restitution obligation that the defendant might be willing to undertake in exchange for the government's agreement not to prosecute on certain charges. If the defendant breaches his restitution agreement, the prosecutor may be at liberty to reinitiate prosecution. But to the extent a sentencing court seeks to impose a lawful, enforceable sentence that incorporates a restitution requirement, and thereby subjects the defendant to possible revision of the sentence for a violation of the restitution order, the authority to impose such a sentence must be premised on Congress's grant of authority, not on the prosecutor's and the defendant's mutual acquiescence. See *United States* v. *Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984) (en banc) (A court has no authority under the FPA to impose on a willing corporation as a condition of probation, in lieu of a fine, the requirement that it contribute money to a charitable organization that has not suffered actual damages or loss from corporation's criminal conduct.).

case. Hence, petitioner is wrong to assume that the version of Section 3579(a) that applies here includes the phrase, "any victim of such offense." See *Miller* v. *Florida*, 482 U.S. 423, 429 (1987); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). But, in any event, petitioner is plainly wrong in arguing (Br. 21-25) that this change restricted the scope of restitution available under the VWPA, or that it somehow demonstrated that the 1982 version of the VWPA was itself intended to be restrictive. As the committee report explained, this change was "unnecessary because it will not alter the meaning of the provision." H.R. Rep. No. 334, 99th Cong., 1st Sess. 7 (1985).[24] The committee report included the following explanation of what is referred to by the phrase "victim of the offense" in the 1982 version of Section 3579(a):

> The term "the offense" in the phrase "victim of the offense," by the ordinary rules of sentence construction, refers to the term "offense" in the antecedent phrase in the same sentence, "convicted of an offense." That term means a victim of the offense for which the defendant has been convicted and is being sentenced.

H.R. Rep. No. 334, *supra*, at 7 (footnote omitted).[25] We subscribe to this analysis of the meaning of the

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[24] This report accompanied H.R. 2713, 99th Cong., 1st Sess. (1985), which is identified at 132 Cong. Rec. H11,295 (daily ed. Oct. 17, 1986) as the source of the change from "the offense" to "such offense."

[25] The omitted footnote to the quoted passage of H.R. Rep. No. 334, *supra*, see Pet. Br. App. A20 n.26, refers to H.R. Rep. No. 1017, 98th Cong., 2d Sess. 83 n.43 (1984), a report that accompanied the proposed Sentencing Revision Act of 1984, H.R. 6012, 98th Cong., 2d Sess. (1984), which was never enacted. See also Pet. Br. 24 n.14 (citing H.R. Rep. No. 1017, *supra*). In the course of discussing the restitution provisions of the VWPA, H.R. Rep. No. 1017 makes several assertions that purport to answer the question whether the VWPA confers authority on the court to "order the defendant to make restitution to victims of the offenses alleged

phrase, "victim of the offense" in Section 3579 as enacted. As we have pointed out, the phrase merely identifies who may receive restitution, just as the phrase "the defendant" merely identifies who may be ordered to pay it. The scope of the crucial term, "order of restitution," is in no way affected by the conclusion that the term "offense" refers to the offense on which sentence is being imposed, *i.e.*, the offense of conviction.[26]

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in the dismissed counts" of an indictment resolved by plea agreement. H.R. Rep. No. 1017 at 83 n.43, *supra*, maintains that an order of restitution under the VWPA cannot extend to losses caused by defendant's conduct outside the offense of conviction.

This statement, which appears in a committee report of a never-enacted bill, has little if any bearing on the meaning of the change from "the offense" to "such offense" that was part of a later enactment, or on any of the issues in this case. First, the fact that H.R. Rep. No. 1017 purports to establish post-enactment legislative history for the VWPA significantly attenuates its value as an exposition of the intent behind that statute. Second, the Report offers no coherent basis in the language of the statute for such a construction. Rather, the Report relies on the "victim of the offense" language in Section 3579(a), which transparently fails to support a limitation on the *amount* of restitution, without explaining *how* the language operates to limit the amount not simply to the losses suffered by the victim but to the losses resulting from the offense of conviction. (Indeed, the Report may have been focusing on the question whether restitution can be ordered to the victims of other offenses and not on the question of restitution to the victim of the offense of conviction.) Also, the Report states that such an interpretation "would deprive the defendant of property without due process of law." As we show in the text, *infra*, such a constitutional argument is without merit. Finally, the reference to H.R. Rep. No. 1017 in the section of H.R. Rep. No. 334 explicating the change from "the offense" to "such offense," see Pet. Br. App. A20 n. 26, is in the form of a cryptic "but see" citation without explanation.

[26] The legislative materials accompanying the VWPA indicate that the restitution provisions of the bill were modeled on two progenitors, one of which was H.R. 6915, 96th Cong., 2d Sess. (1980), which contained restitution provisions as one small part of the monumental proposal in 1980 to revise the federal criminal code.

B. Judicial Authority Under the VWPA To Look Beyond the Particular Count of Conviction in Fixing Restitution Is Consistent With the Nature of Restitution as a Penal Sanction and With the Courts' Customary Flexibility To Fix the Terms of a Sentence

As we have argued, the language of the VWPA fully supports the sentencing court's discretion, in ordering restitution, to take into account conduct other than that

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See 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (remarks of Rep. Rodino).

Statements in the House Report accompanying that proposed legislation indicated that the drafters intended to adopt an "offense of conviction" limitation on the amount of restitution: "Restitution may only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 457 (1980).

This legislative history is of little value in discerning Congress's intent with respect to the VWPA. First, although drafters of the House version of the VWPA acknowledged that the language of H.R. 7191 (which became the VWPA) was drawn in part from the 1980 bill, H.R. 6915 (see 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (remarks of Rep. Rodino)), Congress never explicitly adopted the legislative history of H.R. 6915, nor did it ever refer to or reiterate the above-quoted passage of the committee report accompanying the proposed 1980 bill. The one reference to the 1980 House Report on the predecessor bill in the legislative history of the VWPA (see 128 Cong. Rec. 26,352 (1982), which is part of the section-by-section analysis of H.R. 7191) is to a passage explicating provisions not at issue here.

Also, the VWPA added provisions that did not appear in the earlier versions, including those we have identified as central to the breadth of the statute: the declaration of findings and purposes directing a broad construction of the courts' authority to order restitution, subject only to constitutional limitation; the directive that the court "shall impose an order of restitution to the extent that such order is as fair as possible to the victim . . ."; and the authority for the sentencing court to determine by a preponderance of the evidence "[a]ny dispute as to the proper amount or type of restitution." These differences between the statute proposed in 1980 and the VWPA reflect a considerable expansion of the concept and scope of victim restitution.

underlying the offense of conviction. There are, in addition, other important considerations buttressing the existence of such discretion. First, Congress legislated against a familiar common law background relating both to the nature of restitution as a penal sanction and to the permissible scope of penal restitution orders. Second, the statute should be understood in the context of the customary discretion accorded sentencing judges to look to factors beyond the elements of the statutory offense in fixing the terms of a sentence.

1. One possible source of limitation on judicial authority to fix the amount of restitution under the VWPA is that the order must qualify as an "order of restitution." Since the VWPA does not provide a definition of that term, it should be interpreted as having its contemporary, ordinary meaning. See *John Doe Agency* v. *John Doe Corp.*, 110 S. Ct. 471, 476 (1989). As we will show, the contemporary and ordinary meaning of an order of restitution, when it is employed as a penal sanction, does not inherently limit its scope to the losses caused by the offense of conviction. Rather, the restitution order need only be reasonable, fundamentally fair, and justified by legitimate penological objectives.

a. "Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history." Note, *Victim Restitution and the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933 (1984). Although declining in importance following the separation of civil and criminal law in Western legal systems, restitution never passed entirely out of use as a criminal sanction. Restitution was a common sanction in colonial times (see *id.* at 934), and prior to enactment of the VWPA, it had long been available as a criminal sanction under state law, and as a condition of probation under federal law (*i.e.*, the Federal Probation Act). See *id.* at 934-935.[27]

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[27] See also Jacob, *The Concept of Restitution: An Historical Overview*, in *Restitution in Criminal Justice* 45 (J. Hudson & B. Galaway eds. 1977); Barnett, *Restitution: A New Paradigm of Criminal Justice*, in *Assessing the Criminal*, 350-354 & n. 2 (R. Barnett & J. Hagel eds. 1977) (overview of history of restitution); Slavin & Sorin, *supra*, 52 Fordham L. Rev. at 541 n. 194 (reviewing state statutes).

Although focusing primarily on harm to victims rather than to society as a whole, restitution shares the traditional objectives of other criminal sanctions: retribution, rehabilitation, and deterrence. For example, restoring the victim's property serves the legitimate penal purpose of vindicating society's interest in peaceful retribution by providing a means for the offender to "make the victim whole." Restitution is "constructed to fit the crime and to emphasize the wrongfulness of the offense and the defendant's moral responsibility." Note, *supra*, 97 Harv. L. Rev. at 939. The offender "disgorge[s] his ill-gotten gains or pay[s] for the injury he has caused." He is "forced to restore the status quo at his expense, thus the victim exacts his revenge." Note, *The Victim and Witness Protection Act of 1982: Who are the Victims of Which Offenses?*, 20 Val. U.L. Rev. 109, 140 (1985).

Commentators, and this Court, have also recognized the strong rehabilitative potential of restitution. See *Kelly* v. *Robinson*, 479 U.S. 36, 49 n.10, (1986). Like a criminal fine, restitution involves the payment of money, but restitution may be more effective as a tool for rehabilitation. As one commentator has pointed out, "[t]o the offender's pocket it makes no difference whether what he has to pay is a fine, costs or compensation. But to his understanding of the nature of justice it may make a great deal." M. Fry, *Arms of the Law* 124 (1951). Restitution brings the offender face to face with the concrete effects of his wrongful conduct on individual members of society by establishing a relationship between the offender and "the person whom he made his victim." Restitution forces the offender to continue to confront his victim until such time "as the victim's condition has been restored to the fullest extent possible." S. Shafer, *Com-*

pensation and Restitution to Victims of Crime 135 (1970); see also *id.* at 125-126. For this reason, "in many cases, payment to the injured party will have a stronger inner punishment value than the payment of a sum to the neutral state." Shafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 Minn. L. Rev. 243, 249 (1965).

Finally, "[l]ike a fine, restitution can also be an effective deterrent." Indeed, "restitution may be more effective than a fine." Note, *supra*, 97 Harv. L. Rev. at 938. In many instances, especially in white collar or economic crimes, the criminal's gain is usually equal to the victim's loss, while a fine typically represents only some fraction of the benefits of a crime. Restitution, which "more directly corresponds to the loss the offender has caused," also more effectively deprives the offender of his ill-gotten gains. *Id.* at 939. See also *Kelly* v. *Robinson*, 479 U.S. at 49 n.10 ("[T]he more precise relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.").

b. The meaning and scope of the term "order of restitution" in the VWPA is further illuminated by consideration of the state courts' exercise of their authority to administer restitution as a penal sanction. State court authority to impose a penalty of restitution as a condition of probation has existed for even longer than federal authority, and is now universally prescribed by statute.[28] The legislative history of the VWPA makes

[28] Although state courts may possess inherent authority to impose penal restitution, see *Ex parte United States*, 242 U.S. 27, 50 (1916), modern state cases rely upon statutory authority. Some state statutes place express limits of varying kinds on the extent of restitution that may be ordered; others grant broader authority. For examples of the range of statutory provisions, compare N.J. Stat. Ann. § 2C43-3(e) (West Supp. 1989) (providing the sentencing court with the authority to order restitution up to double the "loss to the victim" where "loss" is defined as "the amount of value separated from the victim"); Ill. Ann. Stat. ch. 38, § 1005-5-6

clear that, in structuring the restitution provisions of the VWPA, Congress was aware of the states' conception of the proper scope and purposes of the penal sanction of restitution, and the bounds of their courts' sentencing power.[29]

(a) and (e) (Smith-Hurd Supp. 1989) (limiting restitution to "actual out-of-pocket expenses, losses, damages, or injuries proximately caused by the conduct of all of the defendants"); *with* Cal. Penal Code § 1203.1 (West Supp. 1989) (permitting the court to order "reasonable" restitution that is "fitting and proper to the end that justice may be done, that amends be made to society for the breach of the law, for any injury done to any person resulting from that breach, and * * * for the reformation and rehabilitation of the prisoner"); Mich. Comp. Laws Ann. § 771.3(2)(d) and (4) (West Supp. 1989) (permitting the court to impose restitution "as the circumstances of the case may require or warrant, or as in its judgment may be proper"); Or. Code Ann. § ORS 137.540 (West Supp. 1989) (court may order as condition of probation payment of "restitution * * * on a schedule of payments determined by the court"); Wis. Stat. Ann. § 973.20 (West Supp. 1989) ("in addition to any other penalty authorized by law, the [court] shall order the defendant to make full or partial restitution * * * to any victim of the crime [as a condition of probation] * * * unless the court finds substantial reason not to do so"). See also Slavin & Sorin, *supra*, 52 Fordham L. Rev. at 540 n.194 (review of state statutes); Note, *supra*, 20 Val. U.L. Rev. at 131 & n. 172 (reviewing statutes of states that "have adopted the unlimited approach in regard to victim restitution").

[29] For example, the section-by-section analysis of H.R. 7191, *supra*, included the following quotation from a Wisconsin case, *Huggett* v. *State*, 83 Wis.2d 790, 798, 266 N.W.2d 403, 407 (1978), to describe "the importance of restitution as a criminal sanction," 128 Cong. Rec. 26,352 (1982):

> Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. [The offender] may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life.

See also 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino quoting the same opinion of the Wisconsin Supreme Court). It is

An examination of state jurisprudence reveals that, except to the extent authority to order penal restitution is specifically limited by statute, the courts have generally assumed an expansive authority to shape restitution orders by considering conduct of the defendant beyond the narrow confines of the actual offense of conviction.[30]

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notable that, under Wisconsin law, restitution may be ordered for "all property or monetary losses caused by the criminal acts of the defendant which have been brought to the court's attention, although the defendant has been convicted or pleaded guilty only to one of them. In such situations, when the amount of the loss is determined on the face of the record or by defendant's admission, no problem arises as to the amount of restitution which can be made a condition of probation." *State* v. *Gerard*, 57 Wis. 2d 611, 619, 205 N.W.2d 374, 378-379 (1973). See also *Garski* v. *State*, 75 Wis. 2d 62, 72-73, 248 N.W.2d 425, 430-431 (1977) (upholding complete order of restitution encompassing charges dismissed under plea agreement as "consistent with the desire to induce financial responsibility as a means of assisting the defendant to lead a law-abiding life").

[30] See, for example, *People* v. *Gallagher*, 55 Mich. App. 613, 223 N.W. 2d 92, leave denied, 393 Mich. 766 (1974) (restitution for value of entire stolen car from defendant convicted of theft of car part); *People* v. *Dawes*, 132 Ill. App. 2d 435, 436, 270 N.E.2d 214, 215 (1971), aff'd, 52 Ill. 2d 121, 284 N.E.2d 629 (1972) (restitution for losses caused by defendant's fraudulent scheme "not only to original complainants but also to those subsequently discovered"); *People* v. *Miller*, 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967) (restitution to various individuals in connection with fraudulent practices of construction firm in excess of amount involved in one count of grand theft); see also *State* v. *Gerard*, *supra*; *People* v. *Lippner*, 219 Cal. 395, 397, 26 P.2d 457, 458 (1933); but cf. *State* v. *Barnett*, 110 Vt. 221, 231-232, 3 A.2d 521, 525 (1939) (in absence of any statutory provision authorizing or restricting restitution, court decided that "restitution conditions in probation cases * * * must be for loss sustained as a direct consequence of the particular crime of which the respondent stands convicted").

So strong is the assumption of broad sentencing authority that the Court of Appeals of Oregon has construed a statute with fairly restrictive language as consistent with broad judicial authority to order restitution beyond the count of conviction. *e.g.*, *State* v. *Foltz*, 14 Or. App. 582, 584-585, 513 P.2d 1208, 1209-1210 (Ct. App. 1973) (order of restitution to welfare department for $2600 il-

Once conferred, the court's authority is inherently limited only by general standards of reasonableness governing consideration of extra-statutory factors that have always been understood appropriately to bear on sentencing, and by the requirement that the restitution order advance recognized penological goals. Although rarely characterizing their rulings directly in terms of penological objectives, state courts have acknowledged that their residual authority to go beyond the conduct underlying the offense of conviction, even under a liberal statute, is not unbounded. See, *e.g.*, *People* v. *Williams*, 247 Cal. App. 2d 394, 55 Cal. Rptr. 550, 560 (Ct. App. 1966) (restitution for assault against store owner who confiscated an overdrawn credit card issued to the defendant could not extend to repayment to the credit card issuer of the amount of defendant's unpaid debt).[31] In upholding an extensive restitution order, after concluding that a "defendant's rehabilitation could best be achieved in a context of complete reparation for the harm done his former customers," one California court stated:

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legally received, as condition of probation on conviction for theft of $120 in welfare payments, not an abuse of discretion notwithstanding that the statute authorized an order of "restitution to the aggrieved party for the damages or loss caused by the offense, in an amount to be determined by the court"). The language of the Oregon statute has since been revised to reflect the more expansive approach. See note 28, *supra*.

[31] In the same vein, the federal courts have recognized limits on the discretion of sentencing courts to order restitution where losses are judged too tenuously related to the defendant's offensive conduct, or as not coming within the appropriate scope of restitutionary liability. See, *e.g.*, *United States* v. *Kenney*, 789 F.2d 783 (9th Cir.) (restitution under the VWPA for bank robbery could not extend to salaries the bank paid its employees to testify at trial), cert. denied, 479 U.S. 990 (1986); *United States* v. *Barany*, 884 F.2d 1255, 1261 (9th Cir.) (restitution under VWPA for mail fraud perpetrated against insurance company could not extend to the company's legal fees in defending a tangentially related civil case), cert. denied, 110 S. Ct. 755 (1989); *United States* v. *Pollak*, 844 F.2d 145 (3d Cir. 1988) (no restitution for legal fees).

> Our conclusion should not be interpreted as authorizing the trial court or the probation office to range far afield in search of all possible losses caused by the defendant and require him to wipe his financial slate completely clean as a condition of his probation. Such a policy would reduce the courts to mere collection agencies. But we do agree with what seems to be the principle established by the California cases, that the probation office in fixing restitution should not be limited by the formalities of the criminal proceeding. Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation, without all of the technical limitations determining the scope of the offense of which defendant was convicted. In determining where to draw the line between what is a reasonable and what is an unreasonable condition, common sense and reason must limit the court's discretion. This discretion must not be disturbed unless there has been a manifest abuse.

People v. *Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967).

2. This flexible approach to fixing the level of restitution is fully in keeping with the courts' customary discretion to consider a wide variety of factors in passing on the more conventional aspects of a sentence. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41, 47-55 (1978) (sentencing judge's authority to calibrate sentence based on a "largely unlimited" range of information; judge could consider evidence that defendant testified falsely at trial, notwithstanding absence of charge or conviction for perjury); *Profitt* v. *Florida*, 428 U.S. 242, 255-258 (1976) (aggravating and mitigating factors considered by judge in imposing death penalty); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85-86 (1986) (upholding state statute that treats "visible possession of a firearm" during the commission of an offense, if found by the judge by a preponderance of the evidence, as a "sentencing factor" for application of a mandatory minimum).

In the new Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987; see 28 U.S.C. 991(b)

(Supp. IV 1986) and 994(k); 18 U.S.C. 3553(a)(2) (Supp. II 1984), Congress has shifted the emphasis in federal sentencing policy away from rehabilitation to punishment, education, and deterrence. See *Mistretta* v. *United States*, 109 S. Ct. 647, 651 (1989). But it has preserved the authority of courts to look beyond the statutory elements of the offense of conviction in imposing sentence. See Sentencing Guidelines promulgated by the United States Sentencing Commission (effective November 1, 1989), implementing 28 U.S.C. 994 *et seq.* By mandating consideration of a host of factors, the Sentencing Guidelines incorporate into the process of fixing sentence various "real offense" characteristics of the criminal violation, in addition to the strict elements of the charge. See *United States Sentencing Commission Guidelines Manual* 1.5-1.6 (Nov. 1, 1989) [hereinafter *Sentencing Guidelines*] (discussion of sentencing guidelines as a "modified real offense system"); see also, *e.g.*, *Sentencing Guidelines* § 5E1.2, at 5.18-5.21 (factors in determining amount of criminal fine).

In particular, with regard to the offense of which petitioner was convicted—a violation of 18 U.S.C. 1029 (Supp. II 1984)—the *Sentencing Guidelines* specifically provide for a punishment range that is geared to the *total* amount of the victim's loss caused by parallel instances of "unauthorized use of an access device" by the defendant, where such instances can be separately charged under the applicable provision. The commentary following § 2F1.1 para. 6 of the *Guidelines*, which sets forth rules of sentencing for a category of fraud and deceit offenses (including violations of Section 1029), provides (emphasis added):

> Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. *The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.*

Moreover, in addressing repetitive or ongoing criminal behavior under § 3D1.2(b), at 3.13, the *Guidelines* direct a grouping together for sentencing purposes of

> Counts involv[ing] the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

3. Congress, in formulating the VWPA, authorized the sentencing court to look beyond the strict statutory elements of an offense to other "appropriate factors"—including the "realities" of the offenders' entire course of conduct towards the victim—in fixing the amount of restitution. Thus, the VWPA works no radical departure from the "real offense" approach to sentencing that the courts have commonly practiced, with this Court's approval, and that Congress recently codified in systematic form in the Sentencing Reform Act of 1984. And there is nothing unique to restitution that would justify a different standard for this penalty, or would warrant restrictions on consideration of additional wrongful conduct of a defendant towards the victim as an "appropriate factor" in sentencing. On the contrary, a reading of the statute as mandating an inflexible disregard of such conduct would seriously undermine the goals of retribution, rehabilitation, and deterrence as well as objectives of fairness and broad compensation that are expressly articulated in the VWPA itself.

a. As discussed above, a preponderance of evidence may convincingly point to a defendant's responsibility for acts that, for reasons unrelated to the ambit of the defendant's activities or the extent of his culpability, are not charged in the indictment, made the basis of a plea bargain, or successfully prosecuted "beyond a reasonable doubt" at trial. Both the defendant and the victim may be well aware that the count of conviction represents only a small fraction of the loss that the victim suffered through the offender's wrongful conduct. Charging only the smaller amount will eviscerate the potential deterrent effect of restitution, which is maximized only if the defendant is made to disgorge the full value of his ill-gotten gains. And the psychological and rehabilitative benefits to a defendant of making the victim whole will be lost if the defendant is ordered to compensate the victim for only a fraction of the actual damage. Finally, an order of restitution that falls short of full compensation to the victim will frustrate the retributive purposes of the punishment, causing the victim to feel that he has not received satisfaction and that justice has not been done. Thus, the VWPA should be construed in a manner that will enable courts to maximize the objectives of restitution to the fullest possible extent. An "offense of conviction" limitation on the amount of restitution disserves this goal.

b. A reading of the courts of appeals decisions applying the VWPA suggests a number of "appropriate factors" (see Section 3580(a)) that may properly enter into the determination whether restitution should include amounts in excess of the loss caused by the specific offense of conviction. Thus, the courts have focused on the concepts of "related acts," *United States* v. *Berrios*, 869 F.2d at 29; on whether there is a "significant connection" between the offense and other acts, see *United States* v. *Duncan*, 870 F.2d 1532, 1536 (10th Cir. 1989); on whether the conduct of conviction is part of a conspiracy, scheme or plan, see *United States* v. *Pomazi*, 851 F.2d 244, 249 (9th Cir. 1988); *United States* v. *Angelica*, 859 F.2d 1390, 1395 (9th Cir. 1988); and, in defining the ambit of the term "victim of the offense," on whether a person suffers as a result of a "continuing" or "uninterrupted series of events surrounding the criminal activity," *United States* v. *Mounts*, 793 F.2d 125, 129 (6th Cir. 1986); *United States* v. *Durham*, 755 F.2d 511, 513 (6th Cir. 1985). See also Pet. Br. 31-33 & n.18-20 (citing cases under the VWPA). And under both the VWPA and FPA, courts have placed significant emphasis on whether the defendant has agreed to make restitution in excess of

the conduct of conviction as part of his plea bargain, *United States* v. *Kirkland*, 853 F.2d 1243, 1251 (5th Cir. 1988), or has admitted to responsibility for the greater loss. See, *e.g.*, *United States* v. *Berrios*, 869 F.2d at 32, 33; *United States* v. *Spambanato*, 876 F.2d 5, 7 (2d Cir. 1989); *United States* v. *Paul*, 783 F.2d 84, 86-88 (7th Cir. 1986). See also cases cited pp. 24-25 & n.21, *supra*.

The intuition that the presence of such factors often makes a broader restitution order more appropriate is fundamentally sound. An amount of restitution that fails to compensate for closely related wrongful conduct is manifestly less fair to the victim, and more likely to undermine goals of deterrence, rehabilitation, and retribution, than is an order that leaves uncompensated losses that are only remotely related to the conduct underlying the conviction. And when the defendant has acknowledged culpability for losses in excess of the conduct of conviction, the unfairness of ignoring such losses may seem greater than if the injury is proved by extraneous evidence, since, in the former case, the offender's responsibility for the loss is not in doubt.[32] The statute makes room for these considerations, not as hard and fast criteria, but as "appropriate factors," see Section 3580(a), that may shape a restitution order.[33] And like other decisions with regard to sentencing, the

[32] The *Sentencing Guidelines* recognize that this factor appropriately bears on sentencing. See § 3E1.1, at 3.23-3.24.

[33] There are other criminal contexts in which the courts are called upon to make decisions based on the degree of relationship between acts or offenses, or whether they are part of a common scheme or plan. Cf. Fed. R. Crim. P. 8(a) (Joinder of Offenses) (offenses may be charged in the same indictment if they are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan"); Fed. R. Evid. 404(b) (evidence of "other crimes, wrongs, or acts" are not admissible to show action "in conformity therewith," but only as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

judge's decision to take into account conduct other than that underlying the offense of conviction, if otherwise within statutory bounds, should be reviewed only for abuse of discretion. *Cf. United States* v. *Youpee*, 836 F.2d 1181, 1182 (9th Cir. 1988).

In this case, it was entirely appropriate for the court to look beyond the offense of conviction, and beyond the petitioner's suggested limit to the losses caused by use of the Godfrey credit card, to the petitioner's entire course of conduct that resulted in injury to MBank. The fact that petitioner refused to admit to responsibility for losses flowing from the unauthorized use of credit cards other than the Godfrey card does not in itself defeat the restitution order under the VWPA. It was sufficient that the government showed by a preponderance of the evidence that petitioner had in fact removed the cards from the post office box and that his actions resulted in their unauthorized use. Given the close relation between this conduct and the offense of conviction, and the existence of a common victim and a common scheme, the court did not abuse its discretion in deciding that the goals of the restitution provisions were best served by a more inclusive order.

II. A SENTENCE OF RESTITUTION FOR LOSSES CAUSED BY ACTS OTHER THAN THE OFFENSE OF CONVICTION DOES NOT VIOLATE THE CONSTITUTION

Section 2(b)(2) of the VWPA directs the courts to protect victims to the fullest extent possible "without infringing on the constitutional rights of the defendant." Congress surely intended to authorize restitution orders in an amount based on conduct other than the offenses of conviction, since such penalties do not violate any constitutional rights. Petitioner argues (Br. 27-31) that the interpretation of the VWPA applied by the courts below infringed his Sixth and Seventh Amendment rights to trial by jury and his Fifth Amendment right to due process. The courts of appeals have rejected constitu-

tional challenges to the VWPA, see, *e.g.*, *United States* v. *Palma*, 760 F.2d 475 (3d Cir. 1985); *United States* v. *Keith*, 754 F.2d 1388 (9th Cir.), cert. denied, 474 U.S. 829 (1985); *United States* v. *Watchman*, 749 F.2d 616 (10th Cir. 1984); *United States* v. *Brown*, 744 F.2d 905 (2d Cir.), cert. denied, 469 U.S 1089 (1984); *United States* v. *Florence*, 741 F.2d 1066 (8th Cir. 1984); but see *United States* v. *Durham*, 755 F.2d at 514 (declining to address the issue), and their reasoning is fully applicable in this case.

1. Petitioner has no Seventh Amendment right to a jury trial on the issue of restitution because that right extends only to civil cases. The characterization of a penalty as civil or criminal is a question of legislative intent, *United States* v. *Ward*, 448 U.S. 242, 248 (1980). Here, the character of restitution as a criminal rather than a civil sanction is evident from the language, structure, and legislative history of the VWPA. The statute permits restitution to be ordered "in addition to or in lieu of any other penalty authorized by law," Section 3579(a)(1), and the "penalty" of restitution is imposed when sentencing a defendant convicted of an enumerated criminal offense. *Ibid.* If restitution is ordered as a condition of probation or parole, revocation (followed by incarceration) may result from the defendant's failure to adhere to the order. Section 3579(g). Also, the "victim of the offense," while the beneficiary of the restitution order, does not initiate, directly participate in, or otherwise control the course of the restitution proceeding.[34] In sum, no provision of the VWPA supports a

[34] The victim has no control over the government's request for restitution or over the government's production of information in support of the restitution request. There is no provision for the victim to appeal the district court's restitution determinations as inadequate, inappropriate, or illegal. See *United States* v. *Franklin*, 792 F.2d 998 (11th Cir. 1986). The consideration of restitution during sentencing does not supplant the victim's right to bring a civil proceeding, although there are provisos precluding double recovery by the victim. Section 3579(e). The collateral estoppel effect of an order of restitution is limited to the "essential allega-

view that an order of restitution is a civil, rather than a criminal sanction.[35]

2. Petitioner's Fifth and Sixth Amendment arguments are based on the erroneous assumption that an order of restitution compensating for injury caused by particular acts necessarily inflicts a penalty for *those* acts. In acting on its findings, during the sentencing phase, as to the fact and amount of injury to MBank from the theft of credit cards other than the Godfrey card, the

tions" of the offense for which the defendant is being sentenced. Section 3580(e).

[35] An order of restitution may be enforced by the United States or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action. Section 3579(h). This is no different in conception from the authority of the United States to employ civil remedies to secure the collection of a criminal fine. 18 U.S.C. 3613. The VWPA also specifies that fact-finding respecting the "proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." Section 3580(d). As discussed, p. 45, *infra*, such a standard of proof traditionally has been associated with a court's determination of factual information relevant to the fixing of sentence and has been approved by this Court as consistent with due process requirements for imposition of criminal punishment. See *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986).

This Court in *Kelly* v. *Robinson*, 479 U.S. at 53 n.14, explicitly recognized that restitution orders imposed in the context of state criminal sentencing proceedings were penal, not civil, sanctions, and noted, with apparent approval, the unanimous view of the federal courts that restitution under the VWPA is a criminal penalty. The legislative history of the VWPA supports the characterization of an order of restitution as a penal sanction. The manager and principal sponsor of the House bill, H.R. 7191, 97th Cong., 2d Sess. (1982), stated in Congressional debate that the legislation "makes restitution available as a penalty." 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino). The section-by-section analysis of the House bill, prepared by the House Judiciary Committee, states that the bill "authorizes the court to order restitution in lieu of or in addition to any other penalty imposed, and thereby explicitly recognizes the importance of restitution as a criminal sanction," 128 Cong. Rec. 26,352 (1982).

court did not adjudicate petitioner's guilt of any crimes other than the offense to which he pleaded guilty, nor did it punish him for any other conduct. As we have explained, it is common practice for sentencing judges to look beyond the narrow confines of the statutory elements of the offense, and to take into account a host of "facts related to the crime," *McMillan* v. *Pennsylvania*, 477 U.S. 79, 92 (citing *Profitt* v. *Florida*, 428 U.S. 242 (1976). Judges routinely consider evidence of past acts or criminal conduct of a defendant—including activities that are remote in time and unrelated to the crime of conviction, or that have never resulted in a criminal conviction. Cf. *Sentencing Guidelines* § 4A1.1, at 4.1; *id.* § 4A1.3, at 4.9 (guidelines for taking into account prior criminal conduct, including, where appropriate, "prior similar adult criminal conduct not resulting in a criminal conviction").

These sentencing practices have withstood constitutional challenge. In *United States* v. *Grayson*, 438 U.S. 41, 45-55 (1978), the Court upheld, as a rational exercise of judicial discretion, a judge's consideration at sentencing of a defendant's false testimony, for which he had been neither tried nor convicted. "A defendant's truthfulness or mendacity while testifying," the Court observed, is "probative of his * * * prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50. Indeed, the *Grayson* Court endorsed the "fundamental sentencing principle," enacted into law by Congress in 18 U.S.C. 3577 as part of the Organized Crime Control Act of 1970 (now codified at 18 U.S.C. 3661), that "no limitation" need be placed on "the information concerning the background, character, and conduct of a person convicted of an offense which a court * * * may receive and consider for the purpose of imposing an appropriate sentence." 438 U.S. at 50.[36]

[36] See also *McMillan* v. *Pennsylvania*, *supra* (potentially criminal conduct for which a defendant has neither been charged nor convicted can constitutionally be considered during the sentencing phase in fixing the magnitude of a sentence); *Williams* v. *New York*, 337 U.S. 241, 246-251 (1949) (Court permitted the sentencing judge to consider the offender's "history of prior antisocial conduct including burglaries for which he had not been duly convicted," *United States* v. *Grayson*, 438 U.S. at 54).

Moreover, once guilt of the offense has been established, there is no Sixth Amendment right to have a jury determine the appropriate penal sanction for that offense. This Court has held that the sentencing function may constitutionally be discharged by the trial judge. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 93. During the sentencing phase, the defendant is entitled to fundamental due process protections and to a decision that is not based on demonstrably inaccurate information. See *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *Gardner* v. *Florida*, 430 U.S. 349, 358 (1976) (plurality opinion); *Mempa* v. *Rhay*, 389 U.S. 128, 134-137 (1967) (right to counsel); *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967) (right to notice, to present evidence, to examine witnesses). The combination of the provisions of Fed. R. Crim. P. 32 and the procedures specified in the VWPA assure that those fundamental protections will be afforded in the imposition of a restitution order, and they were afforded here.[37]

[37] In addition, at the hearing on his plea, petitioner received notice that restitution might be ordered, as required by Fed. R. Crim. P. 11(c)(1) (before accepting a plea of guilty, judge must notify defendant "that a court may * * * order the defendant to make restitution to any victim of the offense"). Although Rule 11(c)(1) requires that the defendant be informed that restitution may be ordered, the judge need not specify the exact amount of restitution before accepting the plea. See Rule 11 advisory committee note to 1985 Amendment ("Because [the VWPA] contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit can-

Indeed, since Rule 32 applies to all aspects of sentencing, a defendant's procedural opportunities to contest the government's factual proffer on the issue of restitution are no less extensive than his opportunities to contest other sentencing determinations made under the procedures of that rule. See Rule 32(c)(3)(A)-(E); VWPA Section 3580(c) and (d).[38]

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not and need not be stated at the time of the plea."); see also *United States* v. *Berrios*, 869 F.2d at 30-31.

The judge told petitioner at his plea hearing that he might be required to "make restitution in the form of money for any property loss suffered by the victim as a result of this offense." J.A. 9. Thus, petitioner received notice that restitution might be part of his sentence, as required by Rule 11(c)(1). To the extent that petitioner might complain that the judge's remark misled him as to the terms of sentence (by implying that the order would only include restitution for a loss *resulting* from the actual offense of conviction), his objection must necessarily be directed at the adequacy of the notice he received under Rule 11, or, on the theory that the judge's remarks constituted a definite "promise" as to his sentence, an objection based on breach of the plea agreement. The judge's remark as to the magnitude of restitution can have no bearing on the judge's statutory power under the VWPA to impose an order of restitution that takes into account harms caused by petitioner's related conduct. In any event, since petitioner has never argued in the course of this litigation that his sentence was imposed in violation of Rule 11, or that the government breached its plea agreement, any such objections are not properly before this Court.

Rule 11 also makes clear that the issue of restitution need not be addressed or resolved at the plea negotiation stage. See Rule 11(e)(1)(A)-(C). Thus, the failure of the parties to the plea agreement to address restitution prior to the plea hearing does not render petitioner's plea invalid under Rule 11.

[38] Petitioner need not have acceded to a stipulation of testimony in this case. He might have called witnesses of his own to undermine the basis of the proposed restitution order; he might even have called the government's witnesses. So long as petitioner's request to rebut the government's showing of the type and amount of appropriate restitution was reasonably justified, the sentencing court would be constrained to grant the request, or to determine that the requested proceedings would "unduly complicate or prolong the sentencing process" under Section 3579(d) and limit the restitution order accordingly.

If petitioner fails to make restitution as ordered, separate due process protections will accompany any consideration of sanctions. Section 3579(g). These will include a consideration whether his failure to make restitution was the result of his indigence (in which event it would be excusable) or was the result of his willful failure to pay despite having acquired some financial resources during the 13 years in which the restitution order remains outstanding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1990

STATUTORY APPENDIX

At the time of petitioner's October 1985 offense, Title 18, United States Code, Sections 3579, 3580, and Sections 2, 3, 18 U.S.C. 1512 note and appendix of the Victim and Witness Protection Act of 1982, provided in pertinent part as follows:

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e) (1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims

under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f) (1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's fail-

ure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

Section 2, 18 U.S.C. 1512 note (1982):

(a) The Congress finds and declares that:

(1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

(2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with the criminal justice system unresponsive to the real needs of such victim.

(3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system.

* * * * *

(b) The Congress declares that the purposes of this Act are—

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;

(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without in-

fringing on the constitutional rights of the defendant; and

(3) to provide a model for legislation for State and local governments.

Section 3, 18 U.S.C. App. at 624 (1982):

Paragraph (2) of rule 32(c) of the Federal Rules of Criminal Procedure is amended to read as follows:

(2) REPORT.—The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

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Supreme Court of the United States

October Term, 1989

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

Petitioner's opening brief discussed a confluence of factors which uniformly and powerfully support his construction of the restitution provisions at issue here: 1) the clear statutory language, 2) the legislative history directly answering the question presented, and 3) the rule of lenity applicable to the construction of criminal statutes. In response, the United States has filed a 47-page brief which argues at length from tangential or wholly immaterial sources and, only in the footnotes, discusses the controlling points which mandate reversal of the judgment. As we now show, the factors described above, the relevant policy considerations, and the facts of this particular case, join together to compel the result advanced by Petitioner.

1. Statutory Language. As we showed in our opening brief, Petitioner's construction of the scope of a district court's restitutory power is mandated by the plain language of § 3579(b), and §§ 3580(a) and (d). Section 3579(b) states that "in the case of *an offense* resulting in- . . . loss . . . of property of a victim of *the offense*," the court may require the defendant to "return *the property* to the owner of the property" (emphasis added). As the United States concedes (Br. 14), the term "offense," from § 3579(a), necessarily means the offense of conviction.[1]

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[1] See also Petitioner's Brief at 14-16; *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (language in second sentence must be read to refer back to prior sentence; "[t]o read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third").

This being so, it follows that the only property as to which restitution may be ordered under § 3579(b) is the property lost as a result of the offense of conviction. Tellingly, Respondent failed even to address the effect of this dispositive provision.

The United States further accepts (Br. 16) that the instructions in both § 3580(a) and (d) directing the district court, in determining the amount of restitution, to focus on the amount of loss sustained by a victim "as a result of the offense," refer only to the offense of conviction. Respondent nevertheless hopes to avoid the controlling language of § 3580 by asserting that the final clause of § 3580(a), which directs the court to consider "such other factors as the court deems appropriate," evinces Congress's intent to permit the court to order restitution for other offenses. But that catch-all clause, which is the entire statutory language basis for Respondent's expansive interpretation, simply cannot be read to override the more specific limitation in the very same sentence, much less the controlling language in § 3579(b). See, *e.g.*, *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("it is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . , particularly when the two are interrelated and closely positioned," and where both are parts of the same statutory section); *FPC v. Texaco, Inc.*, 417 U.S. 380, 394-95 (1974) (existence of separate catch-all provision "does not authorize the [interpreter] to set at naught an explicit provision of the Act").

Indeed, Respondent's interpretation would render meaningless those parts of §§ 3580(a) and (d) which require a sentencing court to consider the amount of the

loss sustained by any victim "as a result of the offense." Under Respondent's view, the court would be obliged to consider *any* losses the victim may have sustained as a result of any of the defendant's unlawful collateral acts. "It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute." *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530 n.15 (1985); *accord, South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510 n.22 (1986). Put to this test, Respondent's construction would not merely render superfluous the phrase "as a result of the offense" in § 3580(a), it would require that very different words—"as a result of any offense by the defendant"—be substituted in its stead.

Having found no solace in the statute's particulars, Respondent next urges the Court (Br. 17-23) to infer an unlimited "flexibility" from the VWPA's general statements of findings and purposes. But any suggestion that Congress contemplated restitution beyond the offense of conviction is disproved by the specific language of § 3579(a), which limits restitution to the victim of the specific offense of conviction—a limitation which the United States concedes. (Br. 14) This can best be understood by example. If Petitioner had been charged with misuse of one credit card from each of several different victims, instead of several credit cards from the same victim, then (as the United States concedes) restitution could only have been ordered for the offense of conviction. This being so, the conclusion is compelled that, in enacting §§ 3579(b) and 3580(a) and (d), Congress did not intend to provide for restitution beyond the offense of conviction under *any* circumstances, including those

cases in which the same individual or entity could be described as a victim of other offenses.[2]

In advancing this argument, Respondent fails to recognize that this Court historically has given only limited weight to general congressional purposes in interpreting the compass of criminal statutes. For example, in *Busic v. United States*, 446 U.S. 398, 408 (1980), this Court give short shrift to the argument that, because Congress intended to mete out stiff penalties for use of a firearm in the commission of a felony, it would not have followed any course inconsistent with that commitment. "[W]hile Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries." *Id.* Likewise, the broad congressional objectives behind the Comprehensive Drug Abuse Prevention and Control Act of 1970 failed to persuade this Court that Congress had

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[2] Moreover, as we show at pages 15-17 below, limiting restitution to the offense of conviction is in fact consistent with Congress's general balanced intent to provide for restitution limited by consideration of the defendant's rights and circumstances, the resources of the judicial system, and the need for "clear procedural rules." Congress served the broader purposes argued by Respondent in other ways as well. As part of the Comprehensive Crime Control Act of 1984 which recodified the restitution provisions, Congress enacted the Victims of Crime Act of 1984. P.L. 98-473 §§ 1401-05, 98 Stat. 2170-75 (Oct. 12, 1984). Pursuant to a part of that Act codified at 18 U.S.C. § 3013, Petitioner incurred a mandatory special assessment of $50. (J.A. 78) That assessment will be used in part to fund crime victim compensation. 42 U.S.C. §§ 10602-03.

incorporated the special parole term prescribed for substantive drug offenses into the penalty for a conspiracy or attempt to commit such an offense. *Bifulco v. United States*, 447 U.S. 381, 398-99 (1980). Again, in *McNally v. United States*, 483 U.S. 350, 369 (1987), this Court read the federal mail fraud statute restrictively, over a dissent urging that the congressional purpose in protecting the integrity of the United States mails compelled a broader reading. And in *Dowling v. United States*, 473 U.S. 207, 230 (1985), this Court interpreted the National Stolen Property Act restrictively, over a dissent protesting that the basic goal of that Act was not served thereby.

In short, §§ 3579(b) and 3580(a) and (d) unambiguously answer this case, particularly in view of the concededly clear limitation in § 3579(a). Respondent's arguments are based on inference at best, and they cannot overcome the plain language of these criminal statutes limiting restitution to the offense of conviction.

2. Legislative History. Respondent seeks to avoid the legislative history which directly answers the issue in this case--in Petitioner's favor—by relegating that history to two lengthy footnotes. (Br. 27-29 nn. 25-26) Examination of the legislative history of §§ 3579 and 3580, however, unequivocally supports our plain language construction.

The United States concedes, as it must (Br. 28-29 n.26) that the 1980 House Report accompanying the provisions in proposed legislation which two years later became the original 1982 version of §§ 3579 and 3580, "indicated that the drafters intended to adopt an 'offense of conviction' limitation on the amount of restitution." Indeed, the Committee report expressly stated that "[r]estitution may

only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 457 (1980), App. 9, *infra*.[3] Respondent nevertheless urges that this legislative history, directly on point, is "of little value" because it was not expressly repeated when the VWPA was enacted; and because the VWPA included some new general statements of its overall purpose to aid crime victims. Still, Respondent is forced to agree that the essentially identical provision in the 1980 bill to which the Report referred was in fact the "progenitor[]" of § 3579(b)(1)(A) of the VWPA. Thus Congress's intent in the original VWPA to limit the amount of restitution to the offense of conviction could not be clearer.

As it must, the United States further concedes (Br. 27-28 n.25) that the House Report accompanying the 1986 amendment to the VWPA cited to a footnote in an earlier report which flatly states that an order of restitution under the VWPA cannot extend to losses caused by defendant's conduct outside the offense of conviction[4]

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[3] The pertinent portions of the 1980 bill, denominated H.R. 6915, and the 1980 House Report are reproduced in the Appendix to this Brief.

[4] H.R. Rep. No. 1017, 98th Cong., 2d Sess. 83 n.43 (1984). Because this 1984 Report was specifically cited in Report No. 334 accompanying the 1986 amendment (and not merely as a "cryptic 'but see' citation"—see Resp. Br. 28 n.4 and Pet. Br. A-21 n.27) it is more than "post-enactment legislative history" as to the amended version of the statute which governs this case.

Respondent again labors to argue that this statement too "has little if any bearing" on this case. In support of its position, Respondent asserts preliminarily (Br. 26-27) that the 1986 clarifying amendment does not apply to Petitioner Hughey because of the Ex Post Facto Clause, citing *Miller v. Florida*, 482 U.S. 423, 429 (1987). Such an argument, however, misapprehends the purpose of the Ex Post Facto Clause. The Clause bars only subsequent *increases* in punishment; it is wholly inapplicable here. See *id.*; *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). Respondent's argument is also erroneous because, in § 79(b) of the 1986 Act, Congress expressly provided that the "clarifying" version was to go into effect upon enactment, see 100 Stat. 3619. Because the 1986 version did not work an increase in punishment, it applied to Petitioner at his sentencing—as the court below implicitly recognized. *See* 877 F.2d at 1258 n.2 (J.A. 90).

Respondent, it seems, would wish away the definitive House Reports by criticizing Congress's views on their "merits." (Br. 28 n.25) Thus, Respondent argues that Congress's stated intention should be accorded no weight because the 1984 House Report supposedly "offers no coherent basis" for its explanation as to how VWPA restitution is limited to the offense of conviction. Such an argument, however, is doubly misguided: first, because Congress's intent is Congress's intent—regardless of its "coherence," and second, because the plain language does limit restitution to the specific offense of conviction. See pages 1-3, *supra*. Respondent similarly suggests that this Court should ignore Congress's express decision to restrict restitution to the offense of conviction, based on Congress's belief that a broader rule "would deprive the

defendant of property without due process of law," because in Respondent's view, Congress was wrong. This too is completely misguided for the inquiry is not whether Congress was "right" or "wrong" but, rather, what Congress intended.[5]

Turning to less direct historical evidence, Respondent next contends (Br. 30) that, in enacting the VWPA, "Congress legislated against a familiar common law background relating both to the nature of restitution as a penal sanction and to the permissible scope of penal restitution orders." To the contrary, Congress enacted the VWPA against a long-standing *statutory* framework, commencing with the 1925 probation act[6] and continuing in the 1948 Federal Probation Act ("FPA"), which uniformly limited restitution to the offense of conviction. See Petitioner's Brief at 20-21. Viewing the VWPA against the backdrop of the legislative history reveals that where Congress intended to effect a major change from that familiar statutory framework, it did no directly, with demonstrated awareness of the change. See *id*. This being

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[5] See, *e.g.*, *Lowe v. SEC*, 472 U.S. 181, 205-206 n.50 (1985) (" '[i]n areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties.' ") (citation omitted).

[6] Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259, 1260 ("While on probation the defendant may . . . also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by *the offense for which conviction was had* . . . . ") (emphasis added).

so, it is far more reasonable to conclude that Congress perpetuated the limitation of restitution to the offense of conviction in fewer words than it is to surmise, as Respondent would, that Congress effected a radical change in that criminal penalty by implication.

Finally, Respondent argues (Br. 32-34) that the scope of restitution under the VWPA may be divined by consideration of state restitutory schemes. There is simply no support for this suggestion. The legislative record reveals no evidence that Congress patterned the *scope* of the VWPA's restitution sanction upon any state model, or that Congress even considered doing so. The only direct comparison documented was to the FPA, and the only significant expansion of that statute, to non-probationary sentences, was expressly acknowledged and properly explained. S. Rep. No. 532, 97th Cong., 2d Sess. 32 (1982). Respondent would have this Court accord greater weight to state restitutory schemes not shown to have been emulated by Congress, than to Congress's own pronouncements explaining 1) that the progenitor of the VWPA would have limited restitution to the offense of conviction, 2) that the VWPA was so limited, and 3) that the VWPA was being amended to eliminate any possible misunderstanding that it was so limited.[7]

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[7] Respondent's reliance on a number of state cases (Br. 34-36) fails for the same reasons. Simply put, a congressional reference to a state court opinion extolling the importance of restitution as a criminal sanction (Resp. Br. 33 n.29) does not even begin to show that Congress adopted all aspects of that state's system. Without exception, moreover, those cases involved orders of restitution imposed as a condition of probation.

3. Rule of Lenity. In a footnote (Br. 17 n.14), Respondent argues that "[i]n support of his reading of the statute, petitioner seeks refuge in the rule of lenity." Respondent's effort to disparage the rule is perhaps best answered by statements made by this Court just last month in *Crandon v. United States*, 58 U.S.L.W. 4234, 4236, slip op. at 5-6, 110 S.Ct. 997 (Feb. 27, 1990):

> [B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [the provision] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

As this Court emphasized, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute *broader* than that clearly warranted by the text." *Id.*, slip op. at 7 (emphasis added).

As we have shown, the statutory language and legislative history are squarely in Petitioner's favor. But even if this were not the case, the statutory provision upon which Respondent rests its case is nothing more than a catch-all phrase instructing the court, in fixing the amount of restitution, to consider as well "such other factors as the court deems appropriate." *See* § 3580(a). Even if this clause is deemed ambiguous—which is the

best that Respondent can possibly hope for—"any" ambiguity must be resolved in Petitioner's favor under the "time-honored" rule of lenity.[8]

4. Policy Considerations. Respondent argues at length policy considerations which are more properly addressed to Congress, not to this Court. Indeed, as we have demonstrated, the United States' admission that § 3579(a) limits restitution to victims of the single offense of conviction directly contravenes its assertions that Congress intended a policy of limitless victim restitution. Rather than giving courts unlimited restitutory authority, Congress opted for a balanced approach which recognizes that a victim's complete recovery under the VWPA may, as a purely practical matter, be limited by a defendant's rights and particular circumstances, as well as by

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[8] As our opening brief also showed (Pet. Br. 27-31), a statute should be construed to avoid grave and doubtful constitutional questions. The cases cited by the United States (Br. 41-42) as having upheld the constitutionality of the VWPA did not involve orders of restitution beyond the offense of conviction where there was no plea agreement or other special justifying circumstances. To the contrary, a court of appeals has observed in a case like this one, that "[i]f a defendant were held liable for restitution to victims of crimes of which no jury had found him guilty, a due process violation may very well occur." *United States v. Satterfield*, 743 F.2d 827, 839 n.10 (11th Cir. 1984); *see also United States v. Durham*, 755 F.2d 511, 514 (6th Cir. 1985) (the "absence of an effective admission or full adjudication of the fact of injury, as opposed to the extent of injury, may put [this defendant's] claims on different constitutional footing than those advanced in" the cases relied on by the United States). The interest in avoiding a decision on that constitutional issue is a further point in favor of the interpretation Petitioner advances herein.

constraints upon the courts' adjudicatory time and resources. See 1980 House Report at 457, App. 9, *infra*, (noting that the precursor of § 3579(b) was drafted to resolve competing views "in an equitable manner").

In any event, Respondent's policy argument that victim restitution will wither away unless its desired construction is adopted is wrongheaded. Respondent suggests (Br. 22) that the restrictive view of the restitutory authority has two "untenable consequences," one of putting the prosecutor to the hard choice of either going to trial on a larger number of counts or sacrificing the interests of victims, and the other of diminishing the incentive to plead guilty. Neither argument has substance. The "hard choice" is the same choice faced by prosecutors in every case in which disposition by conviction of less than the total conduct alleged in the indictment is contemplated. Prosecutors must routinely evaluate whether a given disposition will expose the offender to a sufficient measure of penal sanctions, whether those sanctions be imprisonment, fine, or restitution. To be sure, prosecutors have far more flexibility to insist upon restitution beyond the offense of conviction as part of a plea agreement than they have to vary other incidents of punishment.

Similarly, Respondent errs in asserting (Br. 22-23) that limiting restitution to the offense of conviction, or to the amount specifically agreed upon in the plea agreement, will diminish a defendant's incentive to plead guilty. On the contrary, to the extent that the decision to plead guilty is motivated by a defendant's desire to reduce punishment, such a limitation would promote guilty pleas. Moreover, where the prosecutor and defendant can

specifically agree on an amount of restitution, thereby taking the guesswork out of that portion of the overall penalty, a negotiated settlement of the case is far more likely. A defendant who wishes to make restitution beyond that comprehended by the offense of conviction, whether motivated by genuine remorse, moral obligation, the desire to mitigate punishment, or by some combination of reasons, is free to do so. A defendant may pay restitution, execute a promissory note, or promise to make future payment of agreed restitution in exchange for dismissal of counts. The federal sentencing guidelines have specifically recognized voluntary payment of restitution in advance of adjudication as a factor in mitigation of punishment. U.S.S.G. §3E1.1, comment. (n.1(b)).

Respondent is also wrong in its startling assertion (Br. 20-23) that its expansive reading is necessary because federal prosecutors routinely are unwilling to base their plea bargaining decisions on victims' interests. There is simply no sound basis for the view that prosecutors are now short-changing victims, and even if that were true, the notion that the courts should intercede to remedy the prosecutors' failings is patently absurd. Under the waiver theories developed by the courts of appeals, prosecutors have flexibility to enter into a plea agreement whereby the defendant specifically agrees to make restitution beyond the offense of conviction.[9] While Respondent refuses to recognize an "admissions exception" in the VWPA, its brief (Br. 23-25) acknowledges cases showing

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[9] See, *e.g.*, *United States v. Kirkland*, 853 F.2d 1243, 1251 (5th Cir. 1988); *United States v. Berrios*, 869 F.2d 25, 32, 33 (2d Cir. 1989).

that the courts' enforcement of bargained plea agreements calling for excess restitution has proven fully workable under the FPA. Thus there is no difficulty to be rectified.

Lastly, Respondent (Br. 36-38) seeks to find policy support in the new federal sentencing guidelines, which would consider the total losses in a case such as this. But even apart from the fact that those guidelines do not govern the case at bar because the offense was committed before their effective date, what Respondent fails to appreciate is that those guidelines have no effect upon the scope of a restitution order. The guidelines, it need be noted, prescribe only the non-restitutory components of a sentence, such as the availability of probation or the length of imprisonment. By contrast, the *Guidelines Manual* provides no formula for calculating restitution, stating instead that restitution is to be imposed in accordance with the governing statute. U.S.S.G. §5E1.1(a).

More generally, Respondent suggests (Br. 38) that, under a "real offense" approach to sentencing, courts are free to impose restitution orders beyond the offense of conviction. This argument too is without merit. Respondent's policy argument cannot overcome the clearly expressed choice of Congress to the contrary, or the rule of lenity. Furthermore, restriction of restitution to losses flowing from the offense of conviction does not diminish in any significant respect a court's overall discretion. Courts remain free to look to factors beyond the offense of conviction as to all other aspects of the sentence, within the penalty range provided for that offense. Those aspects include whether to incarcerate, the length of incarceration, the duration and conditions of probation and

supervised release, and the amount of a fine. Moreover, where plea agreements expressly provide for additional restitution, courts may impose such orders.

While Respondent's policy arguments are both unavailing and wrongheaded, there are substantial policy interests which support the decision evidently made by Congress. To begin, this Court has recently recognized that Congress seeks "to reach a workable balance between" competing interests when it legislates. *John Doe Agency v. John Doe Corp.*, 110 S.Ct. 471, 475 (1989) (citation omitted). Indeed, the 1980 House Report accompanying H.R. 6915, the precursor of the VWPA, explicitly states that "the subchapter establishes clear procedural rules for the imposition of a sentence of restitution." 1980 House Report 456, App. 7, *infra*. Respondent, however, proposes a definition which is not only unclear, but is also boundless and unworkable. Under Respondent's view of the statute, the sentencing court could order "restitution" to any victim of the offense of conviction for any loss which the court believes the defendant caused that victim at any time. Thus the court could order restitution for events occurring years earlier. Or it could order restitution for wholly unrelated transactions. Under Respondent's construction, expanded restitution orders could be based entirely on hearsay[10] with findings supported by a mere preponderance of the evidence. Not only is such a construction wholly inconsistent with Congress's expressed

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[10] The Federal Rules of Evidence, except the rules with respect to privileges, do not apply to sentencing proceedings. Rule 1101(d)(3), Fed.R.Evid.

intent to have "clear procedural rules," it is plainly unworkable, and this Court should "decline to read the statutes to produce such an ungainly result." *Busic v. United States*, 446 U.S. at 411.

Petitioner's point is further reinforced by reference back to the congressional findings and declaration of purposes of the VWPA, argued by Respondent. One of the stated purposes was "to ensure that the Federal Government does all that is possible *within limits of available resources* to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." P.L. 97-291 § 2, 96 Stat. 1248-49 (Oct. 12, 1982) (emphasis added). The demands of normal criminal adjudication presently burden the federal courts beyond the limits of existing and foreseeable resources. Yet under Respondent's extravagant construction, restitution would be governed not by a "bright line" offense of conviction standard, but by a standard without clear boundaries, thus creating additional demands which cannot be met within the limits of available court resources.

Finally, Respondent's construction of the statute would introduce an intolerable degree of uncertainty into the restitution component of criminal sentencing, while compromising fairness as well.[11] The "need to provide

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[11] Respondent and *amici curiae* would skew the fine balance of interests struck by Congress in limiting restitution to losses established by conviction. A defendant in a civil suit can litigate vigorously with no risk beyond the claim in issue. The criminal defendant must litigate what would otherwise be civil damage claims, with sharply diminished procedural protections, before the same judge who will shortly pass sentence on

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restitution to any victims of the offense" is but one of seven prescribed sentencing factors under the Sentencing Reform Act[12] from which Respondent argues. (Br. 36-38) A more fundamental purpose of that Comprehensive Crime Control Act, of which the recodified restitution provision is now also a part, is to "provide certainty and fairness in meeting the purposes of sentencing," and to "avoid[] unwarranted sentencing disparities among defendants with similar records *who have been found guilty of similar criminal conduct* . . . . " 28 U.S.C. § 991(b)(1)(B) (1984). Departing from the bright line of losses established by the conviction would inevitably introduce unwarranted sentencing disparities, a consequence which promotes disrespect for the law, which is unfair to defendants, and which Congress has strenuously sought to avoid. The line consistently drawn by Congress, from the 1925 federal probation act to the current statute, limits court-ordered restitution as a criminal penalty to losses established by the offense of conviction. That clearly defined line serves not only the interests of defendants but the larger interests of the criminal justice system, and thus the people as a whole.[13]

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him. A defendant who has a legitimate dispute as to a victim's extra-conviction claim for restitution would risk the perception of the court that he has not accepted responsibility for his conduct, which could adversely affect his plea for leniency. If that defendant should elect not to dispute a dubious claim, for fear of prejudicing other aspects of his sentence, it will result in a plenary order of restitution equivalent to a civil judgment.

[12] 18 U.S.C. § 3553(a)(7) (1986).

[13] The question that largely concerns the *amici curiae*—the scope of restitution that may be ordered in offenses involving

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5. Petitioner's Case. As our opening brief showed, Petitioner consistently objected to any restitution beyond the offense of conviction and refused to acknowledge any guilt or liability for any other offense. Respondent (Br. 25) wrongly suggests to the contrary. While it is true that Petitioner offered to make restitution in the amount of $10,412, the sum of the losses on the Godfrey credit card (J.A. 32, 35, 44, 47, 74), that offer did not constitute any acquiescence in a restitution order beyond the offense of conviction. By its terms, 18 U.S.C. § 1029(a)(2) permits aggregation of transactions and, hence, all unauthorized uses of the Godfrey credit card fell within the compass of the offense of conviction. Moreover, the United States does not, and cannot, suggest that the Petitioner ever acquiesced in an order to make restitution in excess of the amount attributable to the Godfrey card, namely, $10,412. In this respect, Petitioner's stance as to restitution was entirely consistent with the trial judge's advice during the guilty plea proceeding in which Petitioner was informed that he might be required to make restitution for losses suffered as a result of the offense to which he was pleading guilty. (J.A. 9) The short of the matter, simply put, is that the only way Petitioner can be ordered to make restitution for losses outside the offense of conviction is if the statute authorizes the court to order such restitution in the absence of an agreement or other special circumstances. Since we have shown that the court does not

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schemes or conspiracies—simply is not presented here, as our opening brief showed (Pet. Br. 32-33), and as the United States agrees (Resp. Br. 14 n.12).

have that authority, the judgment in this case must be reversed.

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

/s/ Lucien B. Campbell
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APPENDIX

96th CONGRESS
2D SESSION

H.R. 6915

To revise title 18 of the United States Code, and for other purposes.

* * *

TITLE I—REVISION OF TITLE 18

* * *

SUBTITLE III—SENTENCING AND CORRECTIONS

* * *

§ 3101. Purposes of sentencing

The purposes of sentencing are to—

(1) assure that the severity of the sentence is proportionate and directly related to the culpability of the offender and the harm done;

(2) assure that offenders convicted of similar crimes committed under similar circumstances receive similar sentences;

(3) promote respect for the law;

(4) provide adequate deterrence to criminal conduct;

(5) protect the public from further crimes by the defendant;

(6) provide the defendant with needed education, vocational training, medical care, and other correctional treatment in the most effective manner;

(7) provide restitution to victims of offenses; and

(8) reconcile the victim, community and offender.

§ 3102. Factors to be considered in sentencing

The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the purposes of sentencing set forth in section 3101 (relating to purposes of sentencing) of this title;

(3) the kinds of sentences available, including effective alternatives to imprisonment; and

(4) applicable sentencing guidelines under chapter 43 (relating to sentencing guidelines) of this title in effect on the date of sentencing.

* * *

SUBCHAPTER III—RESTITUTION

§ 3331. Applicability of restitution

A defendant who is found guilty of an offense may be sentenced to make restitution to a victim of the offense unless—

(1) the offense is a violation of subchapter VII (relating to investment, monetary, and antitrust offenses) of chapter 25 of this title or section 2536(b) (relating to fraud in a regulated industry) of this title; or

(2) the offense is a class A felony, the defendant is an individual, and no other sentence is imposed on the defendant for such offense.

§ 3332. Nature of sentence of restitution

(a) A defendant may be sentenced under this subchapter—

(1) in the case of an offense resulting in bodily injury, to pay necessary medical expenses attributable to such injury; and

(2) in the case of an offense resulting in loss, damage, or destruction of property—

(A) to return such property; and

(B) if return of such property under subparagraph (A) of this paragraph is impossible or impractical, to pay an amount equal to the greater of the value of the property on the date of the loss, damage, or destruction, or the value of the property on the date of sentencing, less the value (as of the date of sentencing) of any part of the property returned under subparagraph (A) of this paragraph.

(b) The court shall not impose a sentence of restitution under this subchapter if such imposition will unduly complicate or prolong the sentencing process.

(c)(1) The court shall not impose a sentence of restitution with respect to a victim who is a party to any judgment, settlement, or agreement under which

such victim has received or is to receive compensation for the injury, loss, damage, or destruction caused by the offense for which the defendant is convicted.

(2) Any amount paid to a victim under a sentence of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

§ 3333. Consideration in sentencing to restitution

The court, in determining whether to impose a sentence of restitution and the nature and conditions of such sentence, shall—

(1) consider the factors set forth in section 3102 (relating to factors to be considered in sentencing) of this title; and

(2) give primary consideration to the purposes of sentencing set forth in section 3101(a) (1), (2), (3), (4), (5), (7), and (8) (relating to purposes of sentencing) of this title.

§ 3334. Conditions of sentence of restitution

(a) The court may require, as a condition of a sentence of restitution, that the defendant make restitution within a specified period or in specified installments, but such period shall not be greater

than the maximum term of conditional discharge, probation, or imprisonment for the offense, whichever is greatest. If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(b) The court may not impose any condition of a sentence of restitution other than the conditions described in subsection (a) of this section.

§ 3335. Making of restitution relating to organizations

If a sentence of restitution is imposed on an organization, it is the duty of each individual authorized to transfer property for the organization or make disbursement of assets of the organization to return such property or pay restitution from assets of the organization as required by such sentence.

§ 3336. Enforcement of sentence of restitution

A sentence of restitution may be enforced by the United States in the same manner as a judgment in a civil action.

96th Congress) (Report
2d Session) (No. 96-1396

HOUSE OF
REPRESENTATIVES

CRIMINAL CODE REVISION ACT OF 1980

REPORT

together with

ADDITIONAL SEPARATE, SUPPLEMENTAL,
AND DISSENTING VIEWS

OF THE

COMMITTEE ON THE JUDICIARY

TO ACCOMPANY

H.R. 6915

[Including Cost Estimate of the
Congressional Budget Office]

* * *

SUBCHAPTER III—RESTITUTION

This subchapter breaks new ground in Federal law by explicitly recognizing the importance of restitution as a criminal sanction. *See generally* Galway & Hudson, *Offender Restitution in Theory and Action* (1978); Barnett and Hagel, *Restitution, Retribution, and the Legal Process* (1977); Hudson & Galway, *Restitution in Criminal Justice: A Critical Assessment of Sanctions* (1977); J. Hudson, *Restitution in Criminal Justice* (1974). While current Federal law permits a court to require the payment of restitution as a condition of a suspended sentence, this subchapter makes restitution a separate and distinct sentence. Under the

proposed code, an offender can be sentenced to restitution alone or in combination with any other sentence (such as a fine and/or a prison term). In another significant improvement over current law, the subchapter establishes clear procedural rules for the imposition of a sentence of restitution. For example, it describes the nature of the property loss which is compensible [*sic*], and establishes set-off requirements against any subsequent court penalties. Current Federal law (18 U.S.C. 3651) simply limits the use of restitution to cases where it is "deemed best" by the court.

The increased emphasis on the use of restitution has been reflected in recent State enactments. 18 Pa.Cons.Stat.Ann. section 1106 (Purdon) (West Cum. Supp. 1980-81); 1979 Wash. Legis. Serv. ch. 29, pp. 39-1005-5-6; Iowa Code Ann. section 907.12 (1979); New Jersey Code of Crim. Justice, 2 C:43-2 (1980).

§ 3331—Applicability of restitution

This section provides that restitution may be imposed on a criminal defendant unless the offender is an individual convicted of a class A felony or an organizational defendant charged with certain specified antitrust and regulatory offenses. The Committee concluded that these offenses already provide sufficient civil and administrative remedies; therefore, victims of such offenses are adequately protected by current law. For example, an antitrust violation can lead to civil suits and to treble damages. See 15 U.S.C. 15. The Committee is concerned [*sic*] that the use of restitution not become a substitute for complex civil litigation led to the exclusion of

regulatory offenses from section 3331. As provided in section 3332(6), "[t]he court shall not impose a sentence of restitution . . . if such imposition will unduly complicate or prolong the sentencing process." The Committee determined that the regulatory offenses referred to in section 3331 were so complicated as to merit statutory exclusion.

§ 3332—Nature of sentence of restitution

Under current Federal law (18 U.S.C. 3651), a court may require restitution as a condition of a suspended sentence. Thus a defendant "may be required to make restitution or reparation to aggrieved parties for *actual damages* or loss caused by the offense for which conviction was had" (emphasis added). Unfortunately, courts have not interpreted current law in a uniform manner. For example, indirect victims of antitrust violations, such as community agencies, are sometimes considered "aggrieved parties" under section 3651, *United States v. White Stag Manufacturing*, No. 76-75 (D. Or. 1977), and sometimes not. *United States v. Clovis Retail Liquor Dealers Trade Association*, 540 F.2d 1389, 1390 (10th Cir. 1976).

Finally, it is also unclear whether current law permits a court to make a restitution order in compensation for events or actions which are not directly proven at a trial or as a result of a guilty plea. *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950) (restitution limited to a count of conviction. *Compare United States v. Peuchler*, 557 F.2d 1002 (3d Cir. 1977), *with United States v. Landay*, 513 F.2d 306 (5th Cir. 1975), and *United States v. Tiler*, 602 F.2d 30 (2d

Cir. 1979) (restitution conviction upheld where defendants were convicted of a violation of 18 U.S.C. 371 even though actual damages had not been ascertained—in part because all that had been required by the district court was the payment of a sum to the clerk as a contingency for when damages had been established).

Section 3332 resolves the conflicts and ambiguities of current law in an equitable manner. Subsection (a) provides that an offender may be required to make compensation to the victim of an offense in two circumstances. Restitution may only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed.

Restitution is appropriate for offenses involving conduct that produces bodily injury and for offenses involving property damage. In the case of bodily injury, restitution is limited to "necessary medical expenses." A defendant who inflicts property damage has two options. If the property remains available, the offender may return it. If the property can not be returned, the offender is to pay the higher of the market value of the property at the time of the offense or at the time of sentencing. This formulation places the victim of the crime in the most advantageous situation possible, relative to the valuation of the property. The term "property" is defined in section 101 of the proposed code. The Committee does not intend to limit the concept of payment of monetary compensation. If a victim and an offender can agree, the offender may render a service instead.

The Committee intends that the term "victim" be defined to include persons or groups who would not have suffered but for the offender's conduct. American Bar Association, *Sentencing Alternatives and Procedures* standard 19-2.4, comment at 35 (2d ed. tent. draft 1979). However, the Committee does not intend to include insurance companies or other sureties within the definition of "victim."

Subsection (b) expresses the Committee's concern, noted earlier, that the sentencing proceeding not become a protracted "mini-trial" of a civil nature.

Subsection (c) provides that the court shall not order restitution if the victim has received a judgment or settlement (including an insurance settlement) in a proceeding involving the same injury or property loss, damage or destruction. It would, of course, be contrary to public policy for an insurance company to refuse to pay a victim on the ground that the victim might be awarded restitution upon conviction of the wrongdoer. Any amount paid to a victim under a sentence of restitution shall, pursuant to subsection (c)(2), be set off against any money later recovered in any Federal civil proceeding, or in any state proceeding. These provisions ensure that the victim does not receive double compensation for the same injury.

The Committee considered, but rejected as unnecessary, a provision making the ordering of payment of restitution inadmissible in a subsequent criminal or court proceeding in federal cases. The Federal Rules of Evidence protects the offender against prejudicial use of such information. Fed.R.Evid. 403. In addition, it is obviously necessary to refer [*sic*] restitution award in

subsequent civil actions to enforce the award. Finally, the failure to make restitution would be admissible for impeachment purposes. Fed. R. Evid. 801.3(21) and (22). The Committee also concluded that it would be inappropriate, and perhaps unconstitutional, to create such a Federal rule of evidence for the States.

§ 3333—Considerations in sentencing to restitution

This section provides that the court shall give primary consideration to all of the purposes of sentencing, except the defendant's need for rehabilitative services, set forth in Section 3101 of the proposed code. In addition, the court shall consider the nature of the offense and the offender, the need to use effective non-prison sanctions, and the applicable sentencing guidelines. As one court put it:

> Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. The probationer may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life. Conditioning probation on making restitution also protects the community's interest in having the victims of crime made whole.

Huggett v. State, 266 N.W.2d 403, 407 (Wis.1978)

§ 3334—Conditions of sentence of restitution

This section authorizes the payment of restitution in installments. In addition, it limits the available time

period for making such payments to the point when any other sentence would expire. This provision closely follows the recommendations of the National Conference of Commissioners on Uniform State laws. *See* Model Sentencing and Corrections Act section 3-601(c) (1979).

§ 3335—Making of restitution relating to organizations

This section, likes its counterpart in section 3505 of the proposed code (relating to the payment of fines by an organization) creates an affirmative duty by responsible persons within an organization to make court-ordered restitution.

§ 3336—Enforcement of sentence of restitution

This section authorizes the government to take steps to enforce a restitution award in the same manner as if it had obtained a civil judgment. It does not create a right of action against the United States by the person to whom the restitution is to be paid.

FOR ARGUMENT No. 89-5691

(8)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The City of New York, like many other communities, is regularly victimized by the corrupt acts of municipal employees and others who do business with the City. The City has

found that the traditional methods of enforcement and punishment are often inadequate to deal with the volume and variety of corruption cases. Criminal restitution pursuant to the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-3664 offers a promising adjunct to traditional modes of punishment in cases involving municipal corruption.

The City of New York is deeply concerned about the practical implications of petitioner's arguments. The City is harmed by an array of crimes that present especially compelling cases for the use of restitution. Yet because of the prevalence of plea bargaining, restitution as an effective remedy would be eviscerated if it were limited, as petitioner proposes, to the counts on which the defendant was convicted. The Court of Appeals correctly recognized this fact and amply justified its conclusion allowing broader restitution on the basis of the statutory language, history and policy. United States v. Hughey, 877 F.2d

1256 (5th Cir. 1989). The City of New York here emphasizes the importance of restitution and the need to preserve it as an effective remedy. Accordingly, the City of New York respectfully submits this brief, pursuant to Rule 37.4 of the rules of this Court, in support of the respondents' brief for affirmance.

SUMMARY OF ARGUMENT

The City of New York ("The City") aggressively seeks restitution in all major state and federal criminal prosecutions in which the City is a victim. Restitution serves multiple purposes. At the most basic level, it replenishes the public fisc. Restitution adds to the deterrent effect of criminal prosecutions. It is rehabilitative because it alerts defendants to the consequences of their crime to their city and their fellow citizens. Finally, restitution helps to restore the public's trust in their government by demonstrating that abuses of governmental integrity will not be tolerated. Restitution offers

these benefits at virtually no cost to judicial resourses.

The City seeks restitution in a wide variety of cases, but the most prevalent are those in which defendants have committed a large number of similar events such as bribes or kickbacks. In such cases, the defendant typically pleads guilty to one or two counts of the indictment. Therefore the City would achieve next to nothing through restitution if petitioner's arguments were adopted. Thus, especially for the victims of governmental corruption, restitution for damage caused by all acts significantly connected to the crime of conviction must be available.

The language of the Victim and Witness Protection Act, as well as its legislative history and its interpretation by the lower courts which daily are confronted with the realities of the criminal justice system, permits trial courts to award restitution in amounts greater than that charged in the crime of conviction. Indeed,

courts are authorized to go beyond the counts charged in the indictment to all substantially related acts when determining the amount of restitution.

ARGUMENT

THE VICTIM AND WITNESS PROTECTION ACT PERMITS A COURT TO ORDER RESTITUTION FOR DAMAGE CAUSED BY ALL ACTS SIGNIFICANTLY CONNECTED TO THE CRIME OF CONVICTION

I. RESTITUTION SERVES A NUMBER OF IMPORTANT PUBLIC POLICIES.

Restitution is a uniquely effective response to crime. Rather than requiring expenditures of the government, it reimburses the victim. Rather than permitting a defendant to think of punishment as simply the cost of doing his or her (criminal) business, it takes away all the benefits of that business. And finally, rather than requiring separate proceedings or lawsuits, it is fast, efficient and certain -- providing a benefit to prosecutors and defendants as well as the courts.

Since restitution is an economic response to crime, it is important to recognize the financial benefits of this sentencing tool. In an era of tight budgets and crowded prisons, restitution replenishes the public fisc by requiring the defendants to pay back all he or she has stolen, directly or indirectly. The Victim and Witness Protection Act, 18 U.S.C. §§ 3663 - 3664 (formerly 18 U.S.C. §§ 3579-3580) ("The Act"), focuses not on the benefit to the defendant but on "the amount of the loss sustained by any victim." Id. § 3664(a). This focus reflects a change from the traditional focus of restitution. Restitution was generally considered a civil remedy designed to take away misgotten gains from wrong-doers. See W. Prosser, The Law of Torts (4th ed. 1971) § 94, p. 628. Congress's explicit shift in the focus of the statute reinforces the mandate to read it so as to fully effectuate its goal -- compensating the victim.

Restoring to the victim "the amount of the loss" provides the victim -- and taxpayers generally when a governmental unit is the victim -- a substantial benefit. For example, when a restaurant inspector takes bribes to overlook health code violations, the City is injured not only by the loss of penalties for the violations, but also by the amount of the inspector's salary. The City has paid the inspector for honest service but has not received it; the inspector has taken the money under false pretenses. Restitution, unlike any other remedy, can compensate the City for this loss of resources.

A second benefit of restitution is that, when systematically and aggressively pursued, it adds to the deterrent effect of criminal prosecutions. Restitution, unlike jail time, takes away the fruits of the crime. City employees are instructed by each award of restitution that the City will prosecute corrupt City officials and force them to pay -- literally -- for the damage they have

inflicted on the City. Although the City discharges virtually all corrupt employees upon conviction, the City's experience has been that this does not always leave them without assets. They often obtain employment in the private sector. Additionally, many corrupt City employees may still be able to retain their pension benefits.

Therefore the threat of restitution is real to these people because they have something more important than a job to lose. In the ultimate analysis, the threat of losing the ill-gotten gains may even provide a greater deterrent than the threat of a short prison term.

Moreover, restitution need not be draconian to be effective. Because the Act allows criminals to pay restitution over a period of years -- and explicitly directs sentencing judges to evaluate the defendant's ability to pay -- the City is able to obtain fair compensation from its former employees and others without bankrupting them.

In the end, this balancing makes restitution a more credible, and thus more effective, remedy.

Third, restitution enables the City to force corrupt City employees, City contractors and others to face up to the consequences of their acts without adversely affecting their prospects for rehabilitation. Arguably, restitution enhances one's chances for rehabilitation. This Court has recognized these salutary effects of restitution: "Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the state as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine." Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986).

The City also seeks restitution for its retributive effects, as a demonstration to the City's taxpayers that the City will not tolerate personal enrichment at public expense and subversion of vital City services by a few corrupt individuals. The City places its employees in positions of public trust, and they are paid in large measure for their honesty and integrity. If the City cannot count on that integrity, the employee's services are not merely useless, but actually harmful to the City. "Any government agency ... that is vested with the public's interest is grievously compromised when its employees and agents abuse their position to promote their own economic gain." United States v. Gallup, 812 F.2d 1271 (10th Cir. 1987). Unfortunately, unlike most individual victims, the City is associated with its victimizer, and tarred by his acts. The public often perceives that conviction of a single corrupt City official indicates that other malfeasors remain on the City

payroll, or at the very least that corruption is tolerated by a passive City bureaucracy. By seeking restitution the City demonstrates that it is not a passive victim.

Historically, the primary purpose of restitution was not to compensate the victim, but "to protect the offender from violent retaliation from the victim or the community. It was a means by which the offender could buy back the peace he had broken." Note, "Victim Restitution in the Criminal Process: A Procedural Analysis," 97 Harv. L. Rev. 931 (1984). Today the City uses restitution in part to protect against public cynicism and disgust, and as a means to restore faith in government.

Finally, the City uses restitution to quickly repair the harm caused by municipal corruption and to promote judicial economy. In virtually all cases where it is a victim, the City seeks recovery for its loss. When such recovery is not granted through restitution in a criminal

proceeding, the City is forced to sue the criminal separately, in a civil action for damages. This demands a separate civil lawsuit which further expends City resources and burdens the courts. Instead of taking years to resolve these matters in civil actions, an award of criminal restitution can help repair the damage done by a criminal act in a single proceeding. Both the City and the defendant are able to put the matter behind them.

In sum, restitution provides a response to crime that is necessary and unique. It is crucial to the maintenance of order and the public's faith in government that restitution remain available as an effective tool.

II. RESTITUTION IS ESPECIALLY APPROPRIATE WHERE A GOVERNMENT IS VICTIMIZED.

The facts of petitioner's charged crimes are similar to the prevalent pattern of crimes against the City and other governments: a series of acts, each individually fairly small, that add up to large sums. In such cases, it is especially

important that the defendant not escape restitution for all his acts merely because criminal justice is served by a plea of guilty to just one act.

A review of recent cases in the City demonstrates this pattern. For example, the City sought restitution from restaurant inspectors who took bribes to ignore health code violations. An individual bribe could have been just a meal or $200 in cash. The salary of the inspector during any one instance of bribe-taking is minimal. Yet over ten years the bribes add up: one inspector boasted that he had over $100,000 hidden away. Similarly, the cost to the City of having useless -- or worse -- inspectors on the payroll adds up. Yet unless restitution is awarded for more than the one count of bribery to which most inspectors pled guilty, the City will be deprived of any effective remedy to redress this corruption.

In a similar fashion, the City has sought restitution for all the damage caused by social

service workers who installed a rogue telephone extension at work through which they and others made personal calls. Because they told their friends of this phantom billing number, the City found itself with a telephone bill of over $500,000. Unelss the Act is read as the Court below read it, restitution would be meaningless: restitution for only one count of unauthorized use would entitle the City to the cost of a single telephone call.

Numerous other cases demonstrate the same point: Prison guards repeatedly smuggle drugs to inmates of City jails, companies falsify records and short-change the City with each truckload of asphalt and operators of welfare hotels give the welfare recipients cash at discount rather than a room for their rent check. In each case, the City can be made whole only by restitution based on the entire on-going scheme, not on the one act to which the defendant pled guilty. Thus, it is of great importance that the judgment below, and

the Fifth Circuit's reading of the Act, be affirmed.

III. THE ACT PROVIDES DISTRICT JUDGES THE AUTHORITY TO AWARD RESTITUTION FOR ALL ACTS SIGNIFICANTLY CONNECTED TO THE CRIME OF CONVICTION

Examination of the language of the Act, its legislative history, and case law interpreting the statute all demonstrate that Congress intended to allow courts to order restitution for the total amount of loss caused the victim by a defendant's overall course of related criminal conduct. If the Act does not allow such orders of restitution, it is virtually worthless to the City and other similarly situated victims of crimes.

Congress passed the Act to ensure that restitution to victims of crimes is a central consideration, not an "occasional afterthought" in federal sentencing. S. Rep. No. 532, 97 Cong. 2d Sess. 30, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2536. The Findings and Purposes included in the Act itself state that one

of the purposes of the Act is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." Pub.L. No.97-291, § 2, 96 Stat. 1249, reprinted in note following 18 U.S.C. § 1512 (1982). The report of the Senate Judiciary Committee stated that "the premise of [§ 3663] is that the court in devising just sanctions for adjudicated offenders should insure that the the wrongdoer make goods [sic], to the degree possible, the harm he has caused his victim." 1982 U.S. Code Cong. & Ad. News at 2536. It would contradict this fundamental purpose of the Act to limit restitution to the damage caused by the charge pleaded to by the defendant.

The language of the statute contemplates that courts will consider the total amount of the victim's loss in determining the amount of restitution ordered. Section 3664(a) provides

that "[t]he court, in determining ... the amount of such restitution, shall consider the amount of the loss by any victim as a result of the offense" and that it shall consider "such other factors as the court deems appropriate." Under subsection (a) the amount of the victim's loss is not set as the absolute maximum possible restitution, but only as a factor that the court must "consider." Added flexibility is given by the direction that the court consider such "other factors" as it deems appropriate.

Additionally, § 3664(e) gives estoppel effect, in a subsequent civil proceeding, to "[a] conviction of a defendant for an offense involving the act giving rise to restitution under [§ 3663]." 18 U.S.C. § 3664(e). If Congress intended to limit orders of restitution to the loss caused by the specific counts pleaded to by defendants, the words "involving the act" in § 3664(e) would be superfluous. As the Second Circuit stated in United States v. Berrios, 869 F.2d 25, 29 (1989):

"we think the inclusion of [this] phrase implies that the acts for which restitution may be ordered must be related to the offense of which the defendant is convicted, but that those acts may extend beyond the boundaries of the offense itself."

Comparison of the Victim and Witness Protection Act with its predecessor statute also provides strong evidence that Congress intended to allow restitution beyond the loss caused by the counts pleaded to by a defendant. Prior to 1983, the Probation Act was the statute that governed the award of restitution in federal cases. That statute provided that a defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had," 18 U.S.C. § 3651 (emphasis added) (repealed). That Congress chose not to add the underlined language to the Act convincingly demonstrates that the charge to which a

defendant is convicted does not establish the maximum restitution that can be ordered under the Act.

Finally, it is difficult to believe that Congress was unaware of the pervasiveness of plea bargaining in federal criminal cases when it passed the Act. "Since plea bargains often allow the defendant to be convicted of but a fraction of the charges leveled against him, a rule that the offense to which the plea is entered establishes the maximum restitution the court is allowed to order would in many cases minimize the restitution available to the victim of offense." Berrios, 869 F.2d at 30.

CONCLUSION

For the reasons stated this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 89-5691 (9)

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* INSURANCE CRIME PREVENTION INSTITUTE AND NATIONAL HEALTH CARE ANTI-FRAUD ASSOCIATION IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5691

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF INSURANCE CRIME PREVENTION INSTITUTE AND NATIONAL HEALTH CARE ANTI-FRAUD ASSOCIATION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, Insurance Crime Prevention Institute ("ICPI") and National Health Care Anti-Fraud Association ("NHCAA") hereby seek leave to participate as *amici curiae* in the above-captioned litigation. ICPI and NHCAA seek leave to participate as *amici curiae* in support of the position advocated by the United States.[1]

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[1] This request to participate in this litigation has the support of the United States. ICPI and NHCAA have contacted counsel for the petitioner, but have not received his consent to participate in this litigation.

This brief seeks to offer the perspective of the victims of crime, who are not normally represented in federal criminal cases but who are the intended beneficiaries of the VWPA. The members of *amici curiae* are insurers and other public and private entities that are frequent victims of broad-ranging economic crimes often prosecuted under federal statutes.[2] Thus, insurers and other reimbursement organizations have an important interest in the efficacy of restitution.[3] These companies also have an interest in the interpretation of the VWPA as direct victims of fraudulent claims.

This brief brings to the Court's attention relevant legal principles and facts distinct from the prosecution perspective of the United States that bear on the Court's resolution of this case. *Amici curiae* therefore address relevant matter that has not already been brought to the attention of the Court by the parties.

As petitioner recognizes, the VWPA's fundamental purpose is to redress injuries to victims caused by defendants' criminal conduct. ICPI and NHCAA demonstrate why petitioner's interpretation of the VWPA defeats this primary goal and why this reading of the VWPA is neither required by the statutory terms nor supportable by the entirety of the statute. ICPI and NHCAA propose a less truncated approach that will accommodate both the statutory language and Congress' undisputed purpose to provide effective restitution without infringing defendants' rights. This approach implements the VWPA requirement of restitution for "any victim of such offense" to encompass all victims of the defendant's integrated criminal scheme. This interpretation will effectively compensate victims, will encourage essential victim participation in the criminal process and will not arbitrarily award and deny restitution to individual victims without a rational basis. Moreover, this interpretation comports with this Court's fundamental sentencing principles that allow sentencing courts to look beyond the crime of conviction in determining appropriate sentences.

Wherefore, ICPI and NHCAA hereby seek leave to participate in this litigation as *amici curiae*.

Respectfully submitted,

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March 6, 1990

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[2] Insurance fraud is a major economic problem across America, costing the public an estimated $15 billion each year. *See* Borda, *Insurance Fraud Costs Billions*, Journal of Commerce (Dec. 3, 1987). The U.S. Chamber of Commerce estimates that ten percent of the claims submitted to U.S. insurance carriers contain some fraud. *Id.*

[3] Insurance companies and others that have indemnified victims for their losses are proper recipients of restitution under VWPA. *See United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988) (insurance company); *United States v. Bortnovsky*, 879 F.2d 30 (2d Cir. 1989) (New York Property Insurance Underwriters Association); *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

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FRASIEL L. HUGHEY,
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BRIEF OF *AMICI CURIAE* INSURANCE CRIME PREVENTION INSTITUTE AND NATIONAL HEALTH CARE ANTI-FRAUD ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

This case addresses the breadth of restitution available under the Victim and Witness Protection Act ("VWPA")[1] to victims of federal crimes. This brief is filed on behalf of the Insurance Crime Prevention Institute ("ICPI") and the National Health Care Anti-Fraud Association ("NHCAA"), whose members include insurers and other entities that are frequent victims, both directly and indirectly, of wide-scale frauds and other federal crimes. As members of the class of persons whom the VWPA was explicitly enacted to benefit, *amici curiae* file this brief to present the Court with a

[1] Act of Oct. 12, 1982, Pub. L. No. 97-291, 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1248 (codified as amended in various sections of 18 U.S.C.).

broader perspective on the VWPA than may be presented by the parties concerning the narrow circumstances of the instant case. More factually typical of cases in which *amici curiae* are victims are those in which fraudulent schemes, racketeering enterprises or conspiracies are specifically charged in the indictment.

ICPI is a national not-for-profit association, formed in 1970 to investigate reported criminal insurance fraud in cooperation with federal and state law enforcement agencies. ICPI is funded by approximately 380 insurance companies that write about 80 percent of the casualty/property insurance premiums in the United States.

The National Health Care Anti-Fraud Association, founded in 1985, is a mixed public/private association consisting of private insurance carriers, health care reimbursement organizations, Blue Cross and Blue Shield organizations and state and federal law enforcement and regulatory agencies. NHCAA's purpose is to improve the prevention, detection and civil and criminal prosecution of health care fraud. In particular, NHCAA seeks to educate the public as to the importance of the fight against health care fraud, expand the investigative capabilities of health care reimbursement organizations through education in the prevention, detection, investigation and prosecution of health care fraud and assist law enforcement agencies in the prosecution of health care fraud.

Insurance fraud is both difficult to detect and socially and economically significant. This type of fraud costs the public an estimated $15 billion each year. *See* Borda, *Insurance Fraud Costs Billions*, Journal of Commerce (Dec. 3, 1987). The United States Chamber of Commerce estimates that ten percent of the claims submitted to U.S. insurance carriers contain some fraud. *Id.*

Insurers and other reimbursement organizations have an important interest in the efficacy of restitution, not

only because they are direct victims of crime, but also because they frequently must pay for the losses and injuries sustained by other victims as well.[2] One of the purposes of the VWPA "is to remedy undesirable situations in which 'insurance companies and the insurance buying public are being asked to pay off the offender's debt.'" *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985), quoting S. Rep. No. 532, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2519. Indeed, the Act specifically provides that "the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss." 18 U.S.C. § 3579(e)(1).[3]

SUMMARY OF ARGUMENT

As petitioner recognizes, the VWPA's fundamental purpose is to "'ensure that the Federal Government does all that is possible'" within the limits of the Constitution and available resources "'to assist victims and witnesses of crime.'" Brief for Petitioner at 17, quoting from VWPA, Act of Oct. 12, 1982, Pub. L. No. 97-291, § 2(b)(2), 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1248, 1249 (uncodified), *reprinted in* 18 U.S.C.A. § 1512 note (West 1989). Petitioner's restricted interpretation of the VWPA, however, defeats this primary

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[2] Insurance companies and others that have indemnified victims for their losses are proper recipients of restitution under VWPA. *See United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988) (insurance company); *United States v. Bortnovsky*, 879 F.2d 30 (2d Cir. 1989) (New York Property Insurance Underwriters Association); *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

[3] In the petitioner's case, restitution was ordered pursuant to 18 U.S.C. §§ 3579 and 3580 (1982 and Supp. IV 1986), which are now codified at 18 U.S.C. §§ 3663 and 3664 (1987). Throughout this litigation, the earlier codification of VWPA has been used. For the sake of clarity, *amici curiae* will therefore refer to sections 3579 and 3580.

goal. Such a narrow reading of the VWPA is not required by the statutory language permitting restitution to "any victim" of the "offense," is not compatible with the statute as a whole, and is contrary to Congress' express intent in enacting the VWPA. By contrast, a less truncated approach that awards restitution to all victims of a defendant's criminal scheme accommodates both the statutory language and Congress' undisputed purpose to provide the fullest restitution possible without infringing defendants' rights.

Amici curiae make the following principal points in support of a meaningful system of restitution:

(1) When the criminal defendant commits a series of criminal acts that constitute an integrated criminal scheme, the VWPA requirement of restitution for "any victim of such offense" must be read to encompass all victims of the criminal scheme; moreover, when such schemes, conspiracies or enterprises are specifically alleged, the VWPA's provision for restitution to all victims is unequivocal;

(2) An unduly narrow interpretation of the VWPA will arbitrarily award and deny restitution to individual victims without a rational basis;

(3) This Court consistently has allowed sentencing courts to look beyond the specific count of conviction in determining appropriate sentences;

(4) The statutory interpretation petitioner urges will not effectively compensate victims and will discourage essential victim participation in the criminal justice system;

(5) Allowing restitution beyond the minimal elements necessary to prove the count of conviction merely allows victims to recover for their losses without the necessity of conducting separate civil litigation; and

(6) Notice and an opportunity to contest factual issues as to the scope of restitution obviate any fairness or due process concerns.

ARGUMENT

I. THE VWPA REQUIRES AN INTERPRETATION THAT WILL PROVIDE MEANINGFUL COMPENSATION TO VICTIMS OF CRIME.

The central issue in this case is the meaning of the phrase "any victim of such offense," as it is used in 18 U.S.C. § 3579(a). Petitioner advocates an unduly narrow reading of this phrase that will thwart the purposes of the VWPA and deny restitution to deserving victims. His interpretation is not required by the VWPA. In fact, a review of the VWPA as a whole necessitates a broader reading that allows a court to look realistically at the scope of the indictment, the evidence and the plea bargain in determining an appropriate restitution award.[4]

The VWPA provides that "[t]he court, when sentencing a defendant convicted of an offense under [Title 18 and other provisions], may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3579(a)(1). In determining whether

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[4] Interpretation of statutory language should be a "holistic endeavor." *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). In *United Savings Ass'n*, this Court explained the necessity for interpreting the statute as a whole:

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

Id. (citations omitted).

to order restitution and the amount of such restitution, "[t]he court . . . shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a).

The VWPA expressly states that Congress' purposes in enacting the statute were "(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; [and] (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." VWPA, Act of Oct. 12, 1982, Pub. L. No. 97-291, § 2(b)(2), 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1248, 1249 (uncodified), *reprinted in* 18 U.S.C.A. § 1512 note (West 1989). The VWPA also provides that restitution awards are to be "as fair as possible to the victim." 18 U.S.C. § 3579(d); *see also United States v. Mounts*, 793 F.2d 125, 127 (6th Cir.), *cert. denied*, 479 U.S. 1019 (1986).[5]

This statutory language, viewed in the context of the sentencing system in which the VWPA operates, makes clear that the VWPA seeks to compensate all victims who suffer losses as a result of a defendant's overall criminal offense. The "victims" of this offense are all persons who suffer economic loss as a result of the integrated criminal scheme, conspiracy or enterprise which forms the basis for a finding of guilt, whether based on a trial or plea agreement. The victims of the offense for which

[5] To demonstrate the importance of the restitution system, the Sentencing Guidelines make clear that "[i]f a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution." United States Sentencing Commission, Federal Sentencing Guidelines § 5E4.1.(b) (West 1988).

a defendant is convicted can be determined from the indictment, the plea agreement and the evidence establishing defendant's guilt.

The present case is not the typical federal prosecution in which an integrated scheme is formally charged which alleges criminal conduct that has caused substantial economic harm and affected numerous victims. Those cases often involve federal charges of conspiracy, 18 U.S.C. § 371, racketeering enterprises, 18 U.S.C. §§ 1961 *et seq.*, or a scheme to defraud, *e.g.*, 18 U.S.C. §§ 1341, 1343 (mail and wire fraud).[6] Frequently, the defendants are not individuals alone but include corporations and other business entities. On their face, counts formally charging an integrated scheme allege acts which by their nature may have multiple victims. Even under petitioner's narrow reading of the VWPA, all such victims are therefore victims "of such offense" and should receive restitution. This result follows from the undisputed plain language of the VWPA, and is particularly warranted in light of Congress' explicit intention that the act redress to the fullest extent possible all victims of a wrongdoer's conduct.

However, even where the broad nature of the offense is not wholly described within the narrow elements of a particular count, the VWPA should still be read to provide restitution for all victims of the offense which is

[6] "[W]hen the crime charged involves a scheme to defraud, a sentencing court may order restitution paid to victims of the entire scheme even though all of them are not named in the indictment or information." *United States v. Pomazi*, 851 F.2d 244, 250 (9th Cir. 1988). *Accord, Phillips v. United States*, 679 F.2d 192, 196 (9th Cir. 1982) ("restitution may be ordered in an amount caused by the entire scheme rather than only in the amount caused by a particular mailing"); *see also United States v. Davies*, 683 F.2d 1052, 1055 (7th Cir. 1982) ("it is within the power of the court to require restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea").

encompassed within the conduct for which defendant is found guilty. The test for determining what conduct constitutes the "offense" need not be—and should not be—vague. Instead, determination of who are victims of the offense should be determined from a plain, but integrated, reading of the indictment and plea agreement, if any, as well as the evidence presented necessary to prove defendant's guilt. Where a fair reading of the charges and evidence establishes a single integrated offense, allowing restitution to "any victim of such offense" does no violence to the statutory language.[7]

The congressional intent surely was that "*any* victim of such offense" be construed as encompassing those who suffered losses from the integrated criminal scheme which forms the basis of the indictment. No other interpretation achieves Congress' remedial goal reflected in the requirement that the court "consider the amount of the loss sustained by *any* victim as a result of the offense." 18 U.S.C. § 3580(a) (emphasis added). Any other reading would have Congress restricting the scope

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[7] In the present case, petitioner himself interpreted the indictment as alleging a single scheme. As part of the plea bargain, as described in a letter to the trial court by petitioner's attorney, the government agreed to dismiss all remaining counts of the indictment and not to prosecute petitioner for "any other offense arising in the Western District of Texas as *part of the scheme alleged in the indictment*," in exchange for the guilty plea. *United States v. Hughey*, 877 F.2d 1256, 1258 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 716 (1990) (emphasis added).

Moreover, as part of the government's factual proffer during the plea proceeding, the government stated that petitioner had repeated his criminal conduct with regard to a number of other cards. (J.A. 10). Evidence of such repeated thefts and credit card use in the instant case was relevant to the issues of identity and intent.

of "any victim" to the capriciously lucky winner of the plea bargaining lottery.[8]

This less restricted view of the statutory language is more consistent with the entirety of the VWPA, which allows the sentencing court to consider "such other factors as the court deems appropriate" in awarding restitution. 18 U.S.C. § 3580(a). As discussed below, this statute was enacted within the fundamental framework that a sentencing court should "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," in determining the appropriate sentence. *United States v. Tucker*, 404 U.S. 443, 446 (1972). The VWPA envisions that the sentencing court will conduct such a broad inquiry in determining the appropriate amount of restitution, and this inquiry surely includes the full scope of the criminal scheme. Because the sentencing court is to determine the appropriate amount of restitution based on the preponderance of the evidence, this broad-ranging inquiry merely allows the victim the opportunity to receive, as part of a criminal restitution payment, an amount equal to that which could be recovered in a civil proceeding against the criminal.

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[8] Cases decided under the Sentencing Guidelines indicate the appropriateness of a definition of "offense" which includes the acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. *See, e.g., United States v. Vopravil*, 891 F.2d 155, 158 (7th Cir. 1989) (court considered planned transaction that was part of the same course of conduct or common scheme as "clearly related conduct" for sentencing purposes); *United States v. Smith*, 887 F.2d 104, 108-09 (6th Cir. 1989) (sentencing court was not limited to that conduct established by jury finding, guilty plea or plea of *nolo contendere*; court should consider all conduct that was part of the same course of conduct or common scheme or plan as offense of conviction); *United States v. Mocciola*, 891 F.2d 13, 16 (1st Cir. 1989) (sentencing included acts of common scheme or plan as the offense of conviction).

To be sure, notice and other procedural safeguards are proper to assure fairness.[9] But once surprise is avoided and an opportunity to rebut is afforded, it would be a formalism inconsistent with both the statute's words and its manifest intent to hold that the happenstance of selecting examples for inclusion in an indictment or counts of an indictment for a guilty plea creates boundaries around the court's power to order restitution for "any victim".

II. LIMITING RESTITUTION TO THE COUNTS OF A PLEA BARGAIN WILL ARBITRARILY AWARD RESTITUTION BASED ON MERE CHANCE RATHER THAN ANY REASONABLE FORMULA.

Were restitution restricted to the counts chosen for a plea bargain—or artificially limited in an indictment—the public purpose Congress sought to address in the VWPA would be defeated. Congress could not have intended that one victim would be compensated and another would not because the first was mentioned in the first three counts to which defendant pled and the other was referenced in the last three counts which were dismissed; or because 25 were listed in the 25-count indictment and the other 80 were not. In enacting the VWPA to ensure to the fullest extent possible restitution to all victims, Congress expressed no intention that the restitution be awarded arbitrarily or stingily.[10]

In this case, petitioner had a single victim, a bank. By contrast, in many criminal schemes prosecuted under

[9] Rule 11 of the Federal Rules of Criminal Procedure "merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea." Advisory Committee Note for the 1985 Amendment to Fed. R. Crim. P. 11(c)(1).

[10] This Court has recently shown great reluctance to interpret a statute arbitrarily to favor one class of persons over another, particularly when such an interpretation would not achieve the principal purpose of the legislation at issue. *See United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

federal law, numerous victims have been affected. Petitioner's restitution system selects victims to compensate not on the basis of need, extent of injury, level of assistance to the prosecutor or any other rational factor, but solely on the happenstance of the plea bargaining process.[11]

The extent of plea bargaining in the criminal process is widely recognized. *See, e.g., Innes v. Dalsheim*, 864 F.2d 974, 976 (2d Cir. 1988), *cert. denied*, 110 S. Ct. 50 (1989) (noting a 1976 "estimate[] that as high as 90 percent of all criminal convictions are obtained by guilty pleas"); Fed. R. Crim. P. 11, Advisory Committee Note for the 1974 Amendment (noting a 1968 "estimate indicat[ing] that guilty pleas account for the disposition of as many as 95% of all criminal cases"); *see also Santobello v. New York*, 404 U.S. 257, 260 (1971) (the multitude of cases makes plea bargaining "an essential component of the administration of justice").

The plea bargaining and indictment systems also reflect goals that differ from the purposes of the VWPA:

> a prosecutor's decision to charge a defendant for one or more counts of an offense is discretionary, and that discretion is exercised taking into consideration law enforcement objectives which have nothing to do with the congressional objective of compensating crime victims. The decision to specify an amount in the indictment is also often solely for the purpose of satisfying jurisdictional requirements.

[11] The fundamental concept behind restitution, that of "[r]equiring a criminal offender to restore the victim to his original position is intuitively fair." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 934 (1984). This Note observes: "Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution—making the offender pay or work to restore the damage . . . —would seem to be a natural thing for sentencing policy and practice." *Id.* at 934 n.27 (citation omitted).

United States v. Hill, 798 F.2d 402, 405 (10th Cir. 1986). The prosecutor's decisions on indictment and plea bargain, based on a calculus of factors other than compensating victims, should not limit the ability of similarly situated victims to receive restitution.[12] The prosecutor, in exercising discretion to indict or plea bargain, does not envision this decision as a choice of one victim over another.

The possibilities for such arbitrary results cannot have escaped Congress. As the lower court noted, "if restitution were limited to the count of conviction, given the high levels of plea bargaining within our criminal system, in the majority of cases a victim could not be made whole. Congress was not unaware of the pervasive phenomenon of plea bargaining when it passed the VWPA." *United States v. Hughey*, 877 F.2d 1256, 1261 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 716 (1990).[13]

III. THIS COURT CONSISTENTLY RECOGNIZES THAT A SENTENCING COURT MAY USE THE FULLEST INFORMATION POSSIBLE TO DETERMINE APPROPRIATE SENTENCES.

Allowing broad restitution is consistent with the normal practice of sentencing courts, which consider information beyond the counts of conviction in setting sen-

[12] Unlike the typical negotiated civil settlement, where both parties take into account the risks and costs of litigation, there is no procedure in the criminal system for the victims of crime to participate formally in this negotiating process. Similarly, the victim plays no role in the give-and-take of the negotiating process, and the victim receives no quid pro quo from these negotiations. Petitioner's argument would ensure that the victim has no meaningful participation in the plea bargain at all.

[13] *See, e.g., United States v. Spambanato*, 687 F. Supp. 46, 47, 48 (D. Conn. 1988), *aff'd*, 876 F.2d 5 (2d Cir. 1989) (court characterized guilty plea to single count of indictment as "a random choice of one of numerous check charges involved in a unitary scheme" and awarded restitution for the amount "lost by the victim as a result of defendant's overall course of conduct").

tences. To ensure appropriate punishment for criminal offenders, sentencing judges historically have had wide discretion to formulate sentences to fit the specifics of the crime and the criminal. In particular, the sentencing phase of criminal prosecutions traditionally has looked at criminal offenses other than those contained in criminal indictments and guilty pleas.

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams v. New York, 337 U.S. 241, 246 (1949).

Restitution should be no different. Allowing restitution for losses due to a single integrated criminal scheme rather than those particular few instances acknowledged in a plea bargain accords with the sentencing procedures repeatedly endorsed by this Court.

The need to allow the sentencing judge to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," *United States v. Tucker*, 404 U.S. 443, 446 (1972), permeates the federal sentencing structure.[14] Specifically, 18 U.S.C. § 3661 provides that "[n]o

[14] These differences in standards reflect the differing purposes between the trial and sentencing procedures.

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. . . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appro-

limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." [15]

Indeed, the purpose of the sentencing procedure is "to provide the judge with as much information as reasonably practical concerning the defendant's 'character and propensities[,] . . . his present purposes and tendencies,' . . . and, indeed, 'every aspect of [his] life.'" *United States v. Grayson*, 438 U.S. 41, 48 (1978) (citations omitted).[16] The sentencing judge may also look at "criminal

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priate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

Williams v. New York, 337 U.S. 241, 246-47 (1949).

[15] This statutory provision is specifically incorporated into § 1B1.4 of the Sentencing Guidelines, which provides that "[i]n determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." United States Sentencing Commission, Federal Sentencing Guidelines, § 1B1.4 (West 1988). The Commentary to § 1B1.4 emphasizes that "if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range." The Commentary also stresses that the phrase "unless otherwise prohibited by law" applies only to factors such as race, sex and national origin. *See* Sentencing Guidelines § 5H1.10.

[16] Reliable hearsay evidence accordingly is admissible in sentencing proceedings, as the rules against hearsay evidence do not apply to sentencing proceedings. *United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990); *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 329 (1988); *United States v. Lovett*, 844 F.2d 487, 493 (7th Cir. 1988); *United States v. Lee*, 818 F.2d 1052 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987). "Hearsay evidence may be considered . . . so long as the defendant is given an opportunity to refute the evidence and the evidence bears

activity for which the defendant has not been prosecuted." *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983).[17] The broad reach of the sentencing process demonstrates that "[a]ny circumstance that aids the sentencing court in deriving a more complete and true picture regarding the convicted person's background, history, or behavior is properly considered." *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987).[18]

This practical, fair but broad inquiry cannot be reconciled with the oddly constricted approach that petitioner would have sentencing courts follow in determining monetary restitution. There is even more reason to allow a broad range of information to be received as it relates to

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'minimal indicia of reliability.'" *United States v. Hairston*, 888 F.2d 1349, 1353 (11th Cir. 1989) (citation omitted).

[17] *See also United States v. Jordan*, 890 F.2d 968 (7th Cir. 1989) (fact that government decided not to pursue prosecution on count returned by grand jury as part of plea agreement does not preclude consideration of that count in sentencing); *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (court considered facts introduced at trial relating to other charges, even ones of which defendant was acquitted); *United States v. Benton*, 637 F.2d 1052, 1060 (5th Cir. 1981) (evidence of other crimes not resulting in conviction); *United States v. Ray*, 683 F.2d 1116 (7th Cir.), *cert. denied*, 459 U.S. 1091 (1982); *United States v. Lewis*, 862 F.2d 748, 750 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1169 (1989) (evidence of count which has been dismissed by government); *United States v. Cusenza*, 749 F.2d 473, 478 (7th Cir. 1984) (evidence of other criminal activity by defendant); *United States v. Shepherd*, 739 F.2d 510 (10th Cir. 1984); *United States v. York*, 830 F.2d 885 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988).

[18] The Sentencing Guidelines make clear that this information can be considered. The Commentary to Sentencing Guideline § 6A1.3 provides that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. Any information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy'." (citations omitted). *See also United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989).

restitution, where only the defendant's property interest is at stake, than in the sentencing phase, "when his liberty or even his life is in issue." *United States v. Hairston*, 888 F.2d 1349, 1353 (11th Cir. 1989).

Petitioner's limitations contradict the basic ground rules for sentencing. "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937). Petitioner advocates that strictures not otherwise applicable to the court's sentencing judgments should limit how much of his illegal profits the convicted criminal must return. Surely it is neither necessary nor just that the criminal's interests be given greater weight when they are balanced against those of a concrete, specific claimant, his victim, than when they are weighed against the more abstract interests of society in his punishment.

IV. ALLOWING RESTITUTION BEYOND THE DENOMINATED COUNTS OF A PLEA BARGAIN WILL SERVE THE CONGRESSIONAL PURPOSE OF COMPENSATING VICTIMS OF CRIME AND ENCOURAGES VICTIMS TO ASSIST IN THE PROSECUTION AND INVESTIGATION OF CRIME.

Compensating victims is the primary purpose of the restitutionary provisions of VWPA.[19] In enacting this legislation, Congress recognized that

> too often the victim has been the "forgotten person" in the criminal justice system. With few exceptions, victims and witnesses are either ignored by the criminal justice system or simply used to identify offenders.
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> While the defendant in a Federal criminal proceeding is provided with counsel to explain to him both the criminal justice process and his rights as a defendant, the victim has no assistance and few rights. . . .
>
> This insensitivity and lack of concern for the victim and witness is a tragic failing in our criminal justice system, one which hurts the whole society. Without the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice.

S. Rep. No. 532, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2516 ("Senate Report"). According to Congress, "[t]he premise [of the restitution scheme] is that the court in devising just sanctions for adjudicated offenders, should insure that the wrongdoer make good[], to the degree possible, the harm he has caused his victim." Senate Report at 2536.

The comments of various representatives and senators upon introduction of the VWPA indicate that protection and support of victims are the purposes of the Act:

> [i]n Congressional debate, the Act was heralded by its principal co-sponsors as legislation which "will do much to restore the faith of the American public in our system of justice," (statement of Sen. Laxalt), and as a measure "to begin the process of rebalancing the scales of justice . . . [to] insure that victims are given at least the rights now afforded routinely to the accused." (statement of Sen. Heinz). Representative McCollum described restitution as "the ultimate justice," [and] the Act would make restitution "the expected norm, and no longer an afterthought." (statement of Sen. Heinz).

Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L.J. 505, 505 n.2 (1984) (citations omitted).

[19] The VWPA was introduced in Congress during "Crime Victims Week" in April, 1982. *See* Proclamation No. 4929, 47 Fed. Reg. 16, 313 (1982); Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 Tex. L. Rev. 671 (1984).

Any restitution arrangement in which only a few victims of a criminal scheme receive restitution cannot be reconciled with the goals of the VWPA. If restitution is ordered only as to the specific count of a guilty plea, instead of compensating all victims of the offense, most victims will not receive the equity Congress intended.

Compensation for victims seeks more than equity, however. Incentives for victims to come forward aid law enforcement. The law enforcement system often depends on the voluntary participation of crime victims in order to investigate and prosecute criminals successfully. *See* R. Elias, The Politics of Victimization 134 (1986) (estimating that approximately 95% of all reported crimes involving specific victims are discovered from citizen complaints, usually from the victims themselves). The willingness of victims to come forward is vital to the successful prosecution of criminals.[20] Without this assistance in reporting crime, more crime effectively will go unpunished, as the criminal justice system is "absolutely

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[20] The encouragement of victim participation in the criminal process is also reflected in the public policy across the country which places significant burdens on tort actions against those who assist in the prosecution of crime. These actions have "never been regarded with any favor by the courts, and [are] hedged with restrictions which make [them] very difficult to maintain." W. Keeton, Prosser and Keeton on Torts § 119 at 876 (5th ed. 1984).

> This disfavor of [these] actions represents a value choice based on public policy considerations. Sound public policy and the aims of justice require the uncovering of crime and the prosecution of criminals. "A policy that discourages citizens from reporting crime or aiding in prosecution would be undesirable and detrimental to society in general."

Williams v. Ryder/P.I.E. Nationwide, Inc., 786 F.2d 854, 857 (8th Cir. 1986) (citation omitted). Generally, these actions are disfavored because "[t]hey have an undesirable tendency to unduly discourage citizens from seeking redress in the courts," *Chittenden Trust Co. v. Marshall*, 146 Vt. 543, 507 A.2d 965, 969-70 (1986), and because they tend to discourage prosecution of crime. *Kimbley v. City of Green River*, 663 P.2d 871, 882 (Wyo. 1983).

dependent" on victim cooperation. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 Calif. L. Rev. 417, 425 n.42 (1989) (quoting President's Task Force on Victims of Crime, Final Report V (Dec. 1982)).

This Court also has recognized the importance of victim participation in the criminal process.

> [T]he court wholly failed to take into account the interest of the victim. . . . [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts.

Morris v. Slappy, 461 U.S. 1, 14-15 (1983).

Today, the victim of crime no longer has a formal role to play in the prosecution of crime.[21] Participation in the

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[21] The crime victim once had a prominent part in directing the progress of the criminal justice system. "The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family." Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359 (1986). During the American colonial period, victims of crime were personally responsible for apprehending and punishing criminals. In particular, the victims made arrests themselves, paid sheriffs to apprehend criminals, and paid private attorneys to prosecute cases. *See* Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 Calif. L. Rev. 417, 419-20 (1989); Cardenas at 366-371. "When government took over the prosecution of criminal offenses, the victim of the crime became a forgotten entity in the criminal justice system." Note, *The Victim and Witness Protection Act of 1982: Who are the Victims of Which Offenses?*, 20 Val. U.L. Rev. 109, 109 (1985).

contemporary criminal process imposes numerous burdens on victims; many feel victimized not only by the crime, but by the process as well, so that they increasingly fail to assist law enforcement agencies, to the detriment of the public at large. As one scholar has stressed:

> [t]he criminal justice system's current response to the interests of beleagured crime victims is no better than timely, and possibly very late. A sense of alienation with the criminal justice system has reached such heights that many pieces of literature now discuss the problem in terms descriptive of a crisis. Surveys of crime victims reveal intense displeasure with the criminal justice system. Victims often do not report to the police the crimes that have been committed against them, prompting [one commentator] to blame the "decline of faith" in the criminal justice system for this corrosive effect: "Victims report few crimes to the authorities because they do not expect them to be responsive."

Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. L.J. & Pub. Pol'y 357, 357-58 (1986) (citations and footnotes omitted).[22]

The VWPA represents one effort to address the rights and interests of victims in the criminal justice system. The VWPA does not at all return to the days when the victim controlled the prosecution.[23] Instead, the VWPA

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[22] "The victims of crime are truly the forgotten people in the American criminal justice system and are all too often victimized twice—first by the crime and then by the system." Gittler, *Expanding The Role of The Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 117 (1984). "The failure to grant crime victims a prominent role in the dispensation of criminal justice is particularly shortsighted because the continued functioning of the criminal justice system depends on victim cooperation both in reporting offenses and in assisting the prosecution of crimes." Kennard, 77 Calif. L. Rev. at 417.

[23] "The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). In addition, the victim of crime usually has no grounds to challenge a prosecutor's decision not to initiate a prosecution. *S. v. D.*, 410 U.S. 614, 619 (1973).

makes financial fairness to the victim a component of the criminal's sentencing. This arrangement provides a modest and just benefit to the victim for participating in the criminal process, yielding increased social utility. "The fact that restitution benefits individual victims and forces the offender to be responsible to his victim does not make its inclusion in the criminal system inappropriate; rather, restitution underscores the criminal law's concern for victims of crime." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 936 (1984).

Petitioner's constricted interpretation of the VWPA would once again victimize the victim. Petitioner proposes a reading of the VWPA that would promise the possibility of restitution to victims, but renders that promise illusory through the workings of the criminal justice system. The arbitrary selection of a few compensated victims among the many who should be entitled furthers the perception of injustice. Congress intended no such deception or irrational application of the Act when it enacted the VWPA in an attempt to make the victims of crime whole.

V. ALLOWING RESTITUTION BEYOND THE COUNTS OF A PLEA BARGAIN TO ENCOMPASS ALL VICTIMS OF A CRIMINAL SCHEME WILL FACILITATE JUSTICE FOR BOTH VICTIMS AND CRIMINALS.

The ideal punishment in the criminal justice system is one where justice is done to both the criminal and the victim of crimes. For the victims, the VWPA represents a step to achieve that ideal. A broader restitution scheme

will better serve justice by compensating victims and minimizing the need for follow-on civil litigation, thereby reducing the burden on the civil process and facilitating compensation for the victims.[24]

Moreover, as a practical matter, an effective restitution scheme may be the only realistic means of compensating victims. Because most losses suffered by individual victims involve relatively small sums, restitution may be the only practical way of compensating for their economic injuries.[25] A broader reading of the VWPA will do nothing more than allow the victim of crime the possibility of receiving compensation for the loss incurred without the necessity of pursuing a separate civil lawsuit against the criminal defendant.[26] This reading of

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[24] The award of restitution under the VWPA is ultimately within the discretion of the trial court and in the event that a victim is not fully compensated, that victim may resort to civil litigation. In such a situation, the VWPA explicitly provides that criminal defendants are collaterally estopped from relitigating the elements of the crime. 18 U.S.C. § 3580(e). Any interpretation of the VWPA that needlessly limits the reach of this collateral estoppel rule will unnecessarily expand the demands on the civil judicial system by requiring relitigation of issues that as a practical matter have already been determined.

[25] The Senate Report notes "that the average dollar losses victims suffer totals hundreds of dollars, not thousands or tens of thousands." Senate Report at 2536. Separate civil actions to recover these sums simply are not practical.

[26] The VWPA mandates that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. § 3580(d). This evidentiary standard is, of course, the same standard that would be used by a civil claimant to recover monies from the perpetrator of crime. The burden of proof at sentencing proceedings is not a constitutional issue. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) ("[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all"); *see also Specht v. Patterson*, 386 U.S. 605, 610 (1967) (setting forth

the VWPA supports all the legislation's purposes and does not adversely affect the defendant's rights.

For the offender, justice involves penalties sufficient to punish for the crime and deter its repetition. The system proposed by petitioner wil not serve those penal goals.

Most prominently, corporate defendants that commit economic crimes face no drastic sanctions. A fine may not provide justice and often is too small in amount to make crime unprofitable. Meaningful punishment, as well as fundamental fairness, require that a corporation be required to disgorge all the proceeds of its crime, in addition to the punitive sanction imposed by the state for the commission of the offense.

Petitioner's proposal would shelter those defendants, individuals as well as corporations, for whom incarceration is not a realistic punishment. In addition, such a system provides criminal defendants with the ability to manipulate the criminal justice system for their financial benefit, allowing them to weigh the value of the penalty against their potential economic recovery from the offense. A broader reach to the restitution system will alter this calculation in society's favor. "Perpetrators of crime should bear the full consequences of their criminal acts to the extent that this is possible. Neither innocent victims nor society should bear any of the resultant costs." *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir.), *cert. denied*, 479 U.S. 1019 (1986).

However, the restricted statutory interpretation proposed by the petitioner only ensures that even those white collar criminals that are caught will never fully

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procedural safeguards for sentencing); *United States v. Gooden*, 892 F.2d 725, 728 (8th Cir. 1989) (raising sentence level based on uncharged drug transaction proved by preponderance of the evidence does not violate due process).

disgorge the benefits of their crimes.[27] His system allows criminals to retain some and, in petitioner's case, a large majority, of the proceeds of his crime. Such a scheme does not provide effective deterrence and is not the outcome that Congress intended.[28]

VI. THE ABILITY OF COURTS TO AWARD RESTITUTION BEYOND THE COUNTS OF A PLEA BARGAIN MUST BE BASED ON REASONABLE GUIDELINES AND NOTICE TO THE CRIMINAL DEFENDANT.

The Fifth Circuit, and all other courts that have addressed this issue, have recognized that any restitutionary scheme must contain appropriate safeguards. Meaningful procedures for determining the amount and nature of restitution must be implemented to ensure that the purposes of the VWPA are met. *Amici curiae* firmly believe that implementation of appropriate standards is necessary to protect both the victims of crime and the rights of criminal defendants.

The VWPA itself provides specific guidelines for implementation of a restitution order. The VWPA provides that the sentencing judge "*shall* consider the amount of the loss sustained by any victim as a result of the of-

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[27] White collar and economic crimes are often complex and difficult to investigate and stop. Many of these frauds go unpunished and undetected. Therefore, even a full restitution scheme will never remotely restore the full costs of economic crime.

[28] Restitution is "a particularly effective deterrent" for property and white collar crimes, because the criminal's gain is usually equal to the victim's loss. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 939 (1984). In fact, "[t]he deterrent value of restitution would be greater if the amount of restitution exceeded the offender's gain. Given that not all offenders are convicted, an offender on average will actually profit if his punishment is limited to his gain." *Id.* at 939 n.61. Moreover, the theory of restitution is less well suited for crimes against the person, where the victim's loss is not easily quantifiable.

fense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a) (emphasis added). The statute also provides specific burdens of proof for the restitution award.[29] The financial condition of the victim is not relevant to the restitution award because "[s]uch a Robin Hood philosophy is hardly relevant to a system of justice based on equality under the law." *United States v. Clausen*, 792 F.2d 102, 107 (8th Cir.), *cert. denied*, 479 U.S. 858 (1986); *see also United States v. Kallash*, 785 F.2d 26, 31 (2d Cir. 1986).

Beyond these statutory requirements, courts have developed specific procedures under the particular facts of those cases for effectively implementing the congressional goal of awarding restitution to victims of crime. This Court need not set forth detailed guidelines for the restitution scheme allowed by the VWPA. Such a system should await determination through case law developments in the lower courts.

However, some fundamental principles can be ascertained. Notice to the criminal defendant of crimes for which restitution may be required is the critical requirement. Proper notice largely eliminates any constitutional or statutory infirmities.[30] In most instances the

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[29] The government bears the burden of proving the "amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3580(d). The defendant bears the burden of proving his financial resources and financial needs. *Id.* Any dispute as to the proper amount or type of restitution "shall be resolved by the court by the preponderance of the evidence." *Id.*

[30] At a minimum, the defendant "must be forewarned that restitution may be ordered in the higher amount, and he must be given an opportunity to contest any allegation as to the amount of loss he is supposed to have caused." *United States v. Berrios*, 869 F.2d 25, 32 (2d Cir. 1989).

boundaries of the criminal scheme for which restitution is sought are clear; the requirement of notice effectively supplements this clarity and assists in situations where the explicit boundaries of the scheme are difficult to ascertain.

In addition to the notice requirement, the information used in making a restitution award must bear minimal indicia of reliability and the defendant must be given an opportunity to refute this information.[31] This requirement should apply to both hearsay testimony and information relating to criminal activity beyond the counts of conviction.[32] A system based on appropriate notice and an opportunity to contest facts will do nothing more than allow victims of crime to receive compensation in a criminal proceeding, as Congress intended.

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[31] *United States v. Giltner*, 889 F.2d 1004, 1007 (11th Cir. 1989); *see also United States v. Hairston*, 888 F.2d 1349, 1353 (11th Cir. 1989); *United States v. Agyemang*, 876 F.2d 1264, 1272 (7th Cir. 1989).

[32] *United States v. Cohoon*, 886 F.2d 1036 (8th Cir. 1989); *United States v. York*, 830 F.2d 885, 893 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988).

CONCLUSION

A narrow interpretation of VWPA is neither required by the language of the statute nor compatible with Congress' unequivocal intention in passing the legislation. This Court should hold that the VWPA permits restitution to victims of the offense as determined by the indictment, the plea agreement and the evidence of guilt. Under either a broad or narrow interpretation of the VWPA, however, when the indictment formally alleges a scheme, conspiracy or enterprise, all victims of the integrated criminal activity should be able to receive restitution.

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